Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142

JOINT COMMENTS OF
THE NATIONAL MULTIFAMILY HOUSING COUNCIL,
THE NATIONAL APARTMENT ASSOCIATION, THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, THE INSTITUTE OF REAL ESTATE MANAGEMENT, NAREIT, THE NATIONAL REAL ESTATE INVESTORS ASSOCIATION AND THE REAL ESTATE ROUNDTABLE
(the "Real Estate Associations")

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SUMMARY

The National Multifamily Housing Council, the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association, and the Real Estate Roundtable (the "Real Estate Associations") respectfully urge the Commission to refrain from any regulation of agreements between property owners and broadband providers. As our comments demonstrate in detail, the free market is working and the various proposals raised in the Notice of Proposed Rulemaking (the "*NPRM*") are unnecessary.

The Commission's current inside wiring regulatory scheme is inconsistent and inequitable. None of the issues raised by the proponents of regulation can be addressed in a sensible fashion so long as wiring owned by cable multiple system operators ("cable MSOs") is treated differently from that owned by local exchange carriers ("LECs") and competitive fiber broadband ("CFB") providers. Under the Commission's 2003[1] *Sheetrock Order*, cable MSOs lost control of essentially all cable inside wiring. With no incentive to own wiring, in all construction since 2003, in general the MSOs simply have agreed that the building owner holds title to the wiring or transferred any title for a nominal sum. At the same time, the LECs and CFB providers claim to be exempt from the Part 76 rules that govern the cable MSOs, under the Commission's early fiber deregulation orders. They remain free to hold title to wiring inside buildings without fear of having to share it, and so they do. Allegations that providers pay building owners to circumvent the Part 76 rules are thus entirely false. Cable MSOs and

[1] *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003).

apartment owners have merely developed a type of transaction that meets their needs, within the law.

The Commission's current inside wiring rules were created out of a series of unrelated statutes and orders intended for other purposes and cannot be extended further. The Commission has addressed a series of concerns on a piecemeal basis, using whatever tools it had at hand. This proceeding demonstrates that further regulation will only stretch the Commission's authority to the breaking point. If the Commission believes that agreements governing the use of wiring inside buildings must be regulated, it should seek specific authority from Congress, as it did in 1977, with respect to attachment of cable television wiring to poles owned by utility companies. Indeed, the background to the current proceeding is an example of the "regulatory creep" decried by the Commission's *Internet Freedom Order*.[2]

Neither of the specific statutes proposed by the *NPRM* as a source of authority – Section 201(b) or Section 628 -- is of any help. One need only read them to see that they do not cover compensation paid to building owners, wiring exclusivity, or marketing exclusivity.

Setting aside the legal issues, if the goal is to ensure that apartment residents and commercial tenants have access to competitive broadband service, then the market has achieved that goal, under the current regulatory structure. The Real Estate Associations have gathered evidence showing that in 76% of apartment properties (and roughly 80% - 90% of new construction), the property owner has arranged for at least two broadband providers to serve the property. At least one of those providers – and sometimes more than one – is routinely paying

[2] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (2018) at ¶ 101 ("The record confirms that concern about 'regulatory creep'--whereby a regulator slowly increases its reach and the scope of its regulations -- has exacerbated the regulatory uncertainty created by the Title II Order").

some form of compensation to the property owner and has the benefit of exclusive marketing or exclusive wiring rights.

In other words, the kinds of contracts that are allegedly barring competitive entry are actually and clearly not preventing such entry. In addition, satellite-based private cable operators ("PCOs") are still permitted to enter into exclusive access agreements, but they have not increased their market share over the past decade, which is strong evidence that property owners prefer to offer residents a choice. If individual providers are having trouble in particular cases, the reasons may very well have to do with their own business plans: Perhaps they should focus on different market sectors, where there is currently less competition.

There is a lack of competition in the market today, but it is in the smaller, less lucrative buildings that competitive providers choose not to serve. All providers prefer large properties with high income residents or commercial tenants who will spend on premium services. This means that many properties – especially smaller buildings or those in mid- to lower-income areas – are underserved. Furthermore, if a provider does request access to such a building, the provider can get it on very favorable terms. The Commission can best pursue its stated goal of extending the benefits of broadband service competition to more Americans by encouraging broadband deployment in underserved communities, including mid- to lower-income and rural areas and addressing the affordability of such service. Helping new companies carve up the customer base on existing higher-end properties into smaller pieces does not address the root challenges to expanded broadband access.

There is no problem with competitive access to commercial or retail properties. Commercial and retail property owners may adopt various strategies regarding the management of inside wiring, but they all serve the purpose of providing tenants with access to multiple

providers. The agreements with providers are typically right of access or license agreements that grant the provider the right to install its facilities or use owner-installed infrastructure for the purpose of serving one or more tenants at the property. Any fees charged are modest and are not tied to any form of exclusivity.

Proposals for restricting in any way the compensation some providers pay to some owners in some cases completely miss the point. Property owners are driven by resident and tenant demand, and residents and tenants demand access to a choice of competitive broadband services. Property owners do not see broadband providers as a profit center, because they are in the business of serving residents and tenants. All they seek from providers is modest compensation to help offset development and infrastructure deployment costs. Simply put, the revenue owners receive from providers is not sufficient to overcome the strong pressure from residents and tenants for competitive choices. This becomes clear when comparing the fees an owner might receive from a provider to the lost revenue from a single apartment, commercial or retail space vacancy.

In addition, whether under a complete or partial ban on compensation, basic economic principles suggest that any new regulation could have the effect of discouraging owner investment in facilities. From an economic perspective, this is a straightforward conclusion. If owners are unable to earn any compensation for investments in broadband infrastructure, they will spend less on that infrastructure. This will only hinder deployment. Where it doesn't, the costs of any infrastructure will lead to an increase in rents at a time of serious affordability challenges across the country. In fact, when one considers both the direct expenditures made by property owners on broadband infrastructure inside their buildings, which reduce the costs of providers, and the enormous sums invested to develop and acquire apartment communities and

commercial venues of all kinds, it is the real estate industry that is ultimately paying to support the broadband industry, not the other way around.

The proposed transparency requirements do not seem to be aimed at the actual problem they claim to address. The Real Estate Associations oppose proposals for the disclosure of revenue sharing and exclusive marketing arrangements because: (i) the purported harm does not exist; (ii) the *NPRM* is vague, in that it offers no specific language that would allow commenters to fairly evaluate the content, extent, or likely effects of any disclosure; and (iii) poorly-designed disclosure requirements could discourage providers from entering otherwise lawful and useful agreements. For example, the *NPRM* proposes to require providers to disclose to apartment residents the existence of any exclusive marketing arrangements because property owner representatives allegedly show "confusion about the impact of exclusive marketing arrangements." It is difficult to see how disclosing marketing arrangements to consumers would eliminate any claimed confusion on the part of on-site management.

Distributed antenna system ("DAS") and rooftop leases do not need to be regulated. As far as the Real Estate Associations can determine, the only issue here is that property owners are paying one million dollars or more per DAS installation to ensure adequate wireless service, but the wireless carriers are not contributing to that cost.

The Real Estate Associations strongly believe that mandatory access laws are antiquated, unnecessary, and carry the risk of harming other essential infrastructure. By taking control away from the entity that knows the property and its infrastructure best, mandatory access laws hinder investment in broadband deployment, and even threaten environmental and historical preservation efforts. Finally, all such laws raise Constitutional concerns because they override private property rights.

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Introduction

The National Multifamily Housing Council, the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association, and the Real Estate Roundtable respectfully submit these Comments in response to the Commission's Notice of Proposed Rulemaking dated July 12, 2019 (the "*NPRM*").[3] The Real Estate Associations represent a broad array of real estate industry sectors, including residential, retail and commercial property owners and managers, and developers, investors, and lenders.[4]

[3] *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Notice of Proposed Rulemaking (rel. Apr 12, 2019) (the "*NPRM"*).

[4] The individual associations are further described in Exhibit A.

The Real Estate Associations strongly oppose the proposals set forth in the *NPRM*. They are unnecessary and unwise. As these comments will demonstrate, the real estate industry is actively promoting both the deployment of broadband services within apartment communities ,commercial and retail developments, and competition for those services.[5] In fact, the real estate industry is underwriting the expense of infrastructure deployment at a cost of billions of dollars, simply because property owners operate in a competitive market economy and must make competitive broadband service available. Furthermore, every time a new apartment community, office building, retail property or other commercial venue opens its doors, a new market for broadband service also opens. Rather than further regulate agreements between property owners and broadband providers, we respectfully urge the Commission to acknowledge the contributions of the real estate sector, step aside, and allow the existing competitive market to continue to operate.

I. BUILDING OWNERS VIGOROUSLY SUPPORT THE DEPLOYMENT OF BROADBAND COMPETITION EVERYWHERE IN AMERICA.

Before the Commission pursues further regulation that may affect owners of leased property, the Real Estate Associations urge the Commission to examine the current state of broadband deployment in the United States and the role property owners have taken in promoting deployment. The real estate industry supports the Commission's efforts to bolster

[5] These Comments will concentrate on the issues presented in the *NPRM* as they pertain to the apartment industry, with references to the commercial and retail real estate industry where appropriate. This is because exclusive marketing agreements do not exist in the commercial context. Exclusive wiring agreements, as the term is used in the *NPRM*, also do not exist, although in fact most providers own the facilities used to serve their tenants from the minimum point of entry to the building to the tenant's premises and those facilities are not shared with any other provider. Similarly, although providers may pay a negotiated license fee for the right to occupy space and serve the building, door fees and revenue share fees as described in the *NPRM* do not exist in the commercial market. Distributed antenna system ("DAS"), on the other hand, are increasingly common in all sectors of the industry.

broadband deployment across the nation. With the rise of e-commerce, changes in how consumers access media, and our ever-increasing reliance on the internet for basic functions, broadband connectivity is a top priority for the apartment industry.

Property owners place a very high priority on superior broadband deployment in their communities, buildings and developments. Owners look for solutions that deliver reliable, high speed connectivity. The Real Estate Associations believe strongly that the marketplace is working, and so we urge the Commission to avoid measures that could prove counterproductive, and thereby harm investment, constrain competition, and limit consumer access to broadband service. We are also concerned that inopportune regulation could raise the cost of developing real estate and, in particular, multifamily housing at a time when the apartment industry is working hard to increase supply and make housing more affordable for residents.

A. Atoms Engineering is Harder than Bits Engineering.

It goes without saying that broadband providers of all kinds benefit from the work of the real estate industry in creating and maintaining communities for Americans to live, work and shop. As the record in response to the Notice of Inquiry ("*NOI*") in this docket shows, there are many broadband providers who understand the importance of the real estate industry to their own success. Nevertheless, in light of some of the claims of some commenters cited in the *NPRM* as possibly justifying regulation, the Real Estate Associations believe it is important for the Commission to understand the realities of multifamily, commercial and retail property development and the cost of regulation.

Developing real estate, whether multifamily, single-family, retail or other commercial properties, is difficult. Production of any kind has its natural barriers. Those are for the most part objective barriers that can, and often do, fluctuate, but are predictable enough to still meet a pro forma. That said, commercial, retail and multifamily development face significant regulatory

barriers and challenges that make development a cumbersome and costly process. These barriers and the costly development pipeline can threaten the economic contributions that commercial, retail and multifamily real estate make to the U.S. economy every year. Commercial development and operations alone -- office, warehouse, and industrial -- supported 8.3 million American jobs in 2018, contributed $1.0 trillion to U.S. GDP and generated $325.9 billion in salaries and wages.[6] Multifamily residential operation and development supports growth with an economic contribution of $1.3 trillion and supports 12.3 million jobs annually.[7] The retail real estate industry's total GDP impact is $3.9 trillion, supporting 34.8 million jobs.[8] Understanding the macro-level impact of real estate development and operation and the potential negative impacts of well-intentioned but counter-productive regulation must be taken seriously by policy makers of all kinds and at all levels of government.

The following summary illustrates the development pipeline faced by commercial, retail and multifamily real estate developers and the many cost drivers they face in getting a project operational. The typical steps real estate developers must confront are:

- Site selection, evaluation and research: This often includes costly site investigation reports that assess the viability of a site and accompanying land use, zoning, permitting and other requirements as well as any existing or necessary utility infrastructure, including communications infrastructure.

- Local government and lender required evaluations: Environmental, geotechnical and property surveys must be undertaken which can be costly and time consuming.

- Local government review and approval: This can include zoning, site plan and design reviews as well as a lengthy process to secure all necessary entitlement approvals such as

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[6] Dr. Stephen J. Fuller, *Economic Impacts of Commercial Real Estate, 2019 Edition,* NAIOP COMMERCIAL REAL ESTATE ASSOCIATION, https://www.naiop.org/en/Research/Our-Research/Reports/Economic-Impacts-of-Commercial-Real-Estate-2019 (released January 2019).

[7] https://weareapartments.org/data .

[8] ICSC, https://www.icsc.com/uploads/t07-subpage/US-Economic-Impact-2018.pdf (last visited August 30, 2019).

rezoning, transportation infrastructure and utility permits. In addition, political involvement and approval can include public hearings as well as consideration by a planning board/commission and potentially the municipalities governing body.

- Construction: This can include soil testing/work, laying the foundation, utility work/connections and ultimately physical building construction and interior work.
- Final inspections/Occupancy: To ensure compliance with local regulation a variety of inspections are performed before a Certificate of Occupancy can be issued/the property can be operational.

As the above outline shows, development of commercial, retail and multifamily property is an arduous and costly process that requires significant capital outlays, strict regulatory compliance, land use/construction expertise and an abundance of time. Regulation at all levels of government, while often well-intentioned, can have unintended consequences, serve as a significant cost driver and ultimately affect the rent that commercial, retail and residential tenants face.

It is important to note that multifamily development, in particular, often brings with it a level of entitlement subjectivity and regulation layered on top of these common barriers and processes and is much more difficult to predict. Plainly stated, many localities have a development preference that works against multifamily housing production and ultimately worsens the country's affordability challenges. Multifamily development often faces stiff community resistance, competes with other forms of real estate that produce sales tax revenue desired by municipalities and is subject to increasing regulatory barriers at all levels of government.

In a speech before the Urban Institute in November 2015, Jason Furman, former chairman of The White House Council of Economic Advisers, said that the U.S. could build a lot more apartments but noted "multifamily housing units are the form of housing supply that is most often the target of regulation." In fact, a recent study by NMHC and the National Association of

Home Builders ("NAHB") based on responses from a variety of multifamily developers throughout the country found that on average, 32 percent of multifamily development costs are attributable to the costs associated with complying with local, state, and federal regulations.[9] In a quarter of cases, that number can reach as high as 42.6 percent. This comes at a time when all regions of our nation are confronting a housing affordability challenge and the reality that we must dramatically increase the supply of housing to lessen the tight constraints on the housing market we currently feel.

To make the narrative above more concrete, we include two examples here. First, we will describe the experience of a large apartment developer, Continental Properties Company, Inc. ("Continental"), which specializes in developing garden-style communities in markets such as including Memphis, Louisville, Fort Myers, Minneapolis metro, Dallas metro, Denver metro and Chicago metro, among others. The second example is the redevelopment of the mixed-use O Street Market in the historic Shaw neighborhood of Washington, D.C.

Continental is a national developer, owner and operator of high-quality apartment homes across the United States, which was listed in 2018 as the eighth largest developer of apartment homes by the NMHC and reported to be the largest garden style, suburban apartment developer in the United States. Continental typically commences construction on approximately 3,000 new apartment homes per year; the company has developed over 23,000 apartment homes and is currently managing approximately 15,000 apartment homes with another 4,600 apartment homes under construction.

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[9] Paul Emrath and Caitlin Walter, *Regulation: Over 30 Percent of the Cost of a Multifamily Development*, NATIONAL MULTIFAMILY HOUSING COUNCIL, https://www.nmhc.org/contentassets/60365effa073432a8a168619e0f30895/nmhc-nahb-cost-of-regulations.pdf (June 2018).

The Declaration of Kimberly Grimm, Executive Vice President for Continental, is attached as Exhibit B ("Grimm Decl."). Ms. Grimm describes in detail the complexity of the development process for garden-style apartments in typical markets outside of urban core areas. She states, among other things, that it takes Continental an average of 3.5 years from land identification to fully-occupied community, and that Continental's project costs range between $35,000,000 to $68,000,000 per project, without including Continental's labor or other overhead costs.[10] Continental invests roughly $50,000 to $150,000 in building out communications networks at its properties; these communities range in size from 200 to 340 apartment units.[11] Continental reports that any door fees or other incentives it receives from providers are used to offset these costs.[12]

The O Street Market project is an example of the cost and the complexity of redevelopment in a typical urban environment. Any project in a densely built-up area will take years to complete, and total development costs will routinely be in the hundreds of millions of dollars. The overall cost of the project was $315 million, in a combination of private equity, private debt, HUD loans and District of Columbia bond financing. The entire project took over a decade to complete. The result was a mixed-use community that today includes 546 market-rate apartments in three buildings, 90 affordable apartments in a fourth building, 90,000 square feet of retail space, a hotel, and a Giant grocery store inside the historic market building. Residents, retail and other commercial tenants of the four buildings have access to broadband internet access service.

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[10] Grimm Decl. at ¶6.

[11] Grimm Decl. at ¶12.

[12] Grimm Decl. at ¶13.

For more detail on the O Street project, see "A Snapshot of Multifamily Development," attached as Exhibit C. That summary was prepared as part of testimony on the challenges faced by multifamily developers before the U.S. House of Representatives Committee on Financial Services, presented by NMHC Chair Sue Ansel, President and Chief Executive Officer of Gables Residential.[13]

Three-and-a-half years and $35 to $68 million for one development in the middle of the country. Over ten years and $315 million for another just across town from the Commission's offices. What our members do is not cheap and is not easy.

B. Broadband Service in Apartment Communities, Commercial Buildings and Retail Real Estate Is Ubiquitous.

According to the Commission's *2018 Broadband Report*, as of the end of 2016, 92.3% of the population of the United States had access to fixed terrestrial broadband service at speeds of 25 Mbps downstream and 3 Mbps upstream.[14] The same report states that 99.6% of the population had access to 5Mbps/1Mbps mobile service.[15] When satellite service is included, the percentage of Americans with access to fixed 25 Mbps/3Mbps service rises to 95.6%, "with deployment to 81.7 percent of Americans in rural areas and 99 percent in urban areas."[16] Deployment of fixed terrestrial service in the most sparsely populated parts of the country therefore remains a concern, but as a practical matter some form of broadband service is nearly

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[13] Sue Ansel's full testimony is available at: https://financialservices.house.gov/uploadedfiles/09.05.2018_susan_ansel_testimony.pdf

[14] *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, 1681 at ¶ 50 (2018) ("*2018 Broadband Report*").

[15] *Id*. at ¶ 52, Table 2a.

[16] *Id*. at ¶ 51.

ubiquitous in multiple tenant environments ("MTEs"). Very few apartment residents or businesses lack access to broadband service. *See* Part V.B. for more on this point.

These existing rates of deployment and service speeds were achieved only with the cooperation of the real estate industry. Regulatory measures that reflect the economic and business conditions that promote cooperation will promote deployment. Conversely, regulation that reduces incentives for cooperation is likely to slow future deployment.

With over 99% of urban Americans already having access to broadband networks and services, the Real Estate Associations believe that overbroad or unduly aggressive regulation raises the prospect of unintended consequences that may harm the existing market, which is successfully providing broadband infrastructure and services.

C. Property Owners Actively Promote Deployment of Competitive Services at Their Properties and in their Communities Because Residents, Tenants, and Consumers Demand It.

The real estate industry has a long history of promoting competition and access to communications services by creating densely populated markets for the economically efficient deployment of new services and new providers. Their economies of scale have made apartment properties in particular very attractive to the cable MSOs, the SMATV providers and PCOs, the LECs, and now the CFB providers. Every time a new rental apartment, commercial or retail property is built, the market for communications services expands.

In fact, the goals of the Commission and of property owners are closely aligned. In the past, owners wanted communications services because their residents, tenants or consumers demanded it. Today, owners want multiple broadband providers for the same reason: resident, tenant and consumer demand.

1. The State of Competition in the Residential Apartment Industry.

The real estate industry is highly competitive, with thousands of companies of all sizes seeking to attract and retain residents.[17] Their business is to provide residents with attractive places to live. Rental apartment owners must address the particular needs and concerns of every resident, and every interaction between on-site staff and a resident is part of a personal, human relationship. Apartment owners strive not just to satisfy, but to anticipate, resident desires and expectations in order to attract and retain them. Clearly there are exceptions, but it is very rare for residents not to have some sort of choice of where to live: There are always other apartment owners who are trying to attract the same individuals and families to their properties. Owners must offer high quality, reliable broadband service if they are to succeed in competing with those other owners. This competition, in which property managers are engaged in every single day, is central to the apartment business and it is competition that has driven property owners to ensure that broadband infrastructure is available in their communities. This deployment has taken place without government mandates, and the Real Estate Associations strongly believe that government intervention is not needed.

Owners of apartment properties are keenly aware of the importance of ensuring that residents have access both to broadband internet access service and to a competitive choice of providers.[18] The option to choose their vendor is very important to residents. Younger residents

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[17] Indeed, the Federal Trade Commission has ruled that the real estate industry is exempt from pre-merger antitrust review precisely because it is so competitive. *Premerger Notification, Reporting and Waiting Period Requirements*, 61 Fed. Reg. 13666, 13674 (Mar. 28, 1996) (finding no single entity is likely to have enough market concentration to trigger antitrust concerns).

[18] Grimm Decl." at ¶14; *see also,* Declaration of Steve Sadler and Henry Pye, attached as Exhibit D ("Sadler/Pye Decl.") at ¶¶7-8; Exhibit E, Declaration of Art Hubacher ("Hubacher Decl.") at ¶7; Exhibit F, Declaration of Jason Knutsen ("Knutsen Decl.") at ¶5; Exhibit G, Declaration of

tend to want the high bandwidth data packages, while older residents still prefer video, data and voice bundle options.[19] But all residents demand access and expect a choice. Furthermore, residents generally have other options in deciding where to live. On a national basis, almost half (46.8%) of apartment residents move every year,[20] and limiting resident turnover is a major concern for property managers. If property management cannot meet resident needs, residents can and will move; this turnover reduces occupancy rates, which in turn reduces the income the owner receives from a property.[21] In short, owners have a very strong incentive to ensure that each of their properties is served by multiple providers that provide reliable, high quality, and high speed broadband service.

In fact, the typical apartment community today has at least two broadband vendors available to residents, in markets where such competition exists.[22] These vendors typically include the local cable MSO, the LEC broadband product, and often one or more CFB

Andrew Smith ("A. Smith Decl.") at ¶5; Exhibit H, Declaration of Kimberly Smith ("K. Smith Decl.") at ¶5; Exhibit I, Declaration of Lisa Yeh ("Yeh Decl.") at ¶5; Exhibit J, Declaration of Kathleen Austin ("Austin Decl.") at ¶3.

[19] Yeh Decl. at ¶5; Knutsen Decl. at ¶5; Austin Decl. at ¶3.

[20] National Apartment Association, Survey of Operating Expenses and Income in Rental Apartment Communities (2018), https://www.naahq.org/news-publications/units/september-2018/article/survey-operating-income-expenses-rental-apartment, (last visited June 3, 2019).

[21] A. Smith Decl. at ¶5; K. Smith Decl. at ¶5; Yeh Decl. at ¶5; Knutsen Decl. at ¶5; Austin Decl. at ¶3.

[22] A. Smith Decl. at ¶6; K. Smith Decl. at ¶6; Yeh Decl. at ¶6; Knutsen Decl. at ¶6; Austin Decl. at ¶4.

providers.[23] In fact, many apartment communities have more than three broadband vendors available.[24]

Generally speaking, there will always be service at a property from the cable MSO.[25] Those companies have such a large and heavily advertised presence in the market and have such ubiquitous networks that they are generally prepared to serve any building in their service area,[26] and residents expect to have their service as an option.

Residents also typically are very much aware of the existence of broadband service from the LEC. Consequently, where such service is available owners need to offer that option to meet resident demand as well.[27] Nevertheless, it is not unusual for Verizon or AT&T to refuse to extend broadband service to a building or refuse to upgrade their existing copper facilities to fiber so that higher speed broadband service is available to the residents.[28]

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[23] Grimm Decl. at ¶13; A. Smith Decl. at ¶6; K. Smith Decl. at ¶6; Yeh Decl. at ¶6; Knutsen Decl. at ¶6; Austin Decl. at ¶4.

[24] Hubacher Decl. at ¶7; A. Smith Decl. at ¶6; K. Smith Decl. at ¶6; Knutsen Decl. at ¶6; Austin Decl. at ¶4.

[25] Sadler/Pye Decl. at ¶9; A. Smith Decl. at ¶7; K. Smith Decl. at ¶7; Yeh Decl. at ¶7; Knutsen Decl. at ¶7; Austin Decl. at ¶5.

[26] There are limits to the cable MSO networks in rural and exurban areas, and even some suburban areas. Cable franchises typically set a system density based on homes per mile below which the cable MSO is not required to serve. In built-up areas, their obligations to serve MTEs vary from franchise to franchise; they may be required to serve upon request of the building owner, or they may have discretion to pick and choose which buildings to serve.

[27] Sadler/Pye Decl. at ¶10, A. Smith Decl. at ¶8; Yeh Decl. at ¶8; Knutsen Decl. at ¶8; Austin Decl. at ¶6.

[28] *See,* A. Smith Decl. at ¶8; K. Smith Decl. at ¶21; Yeh Decl. at ¶8; Knutsen Decl. at ¶8; Austin Decl. at ¶6; Hubacher Decl. at ¶11.

CFB providers are also attractive to owners and residents but their service is typically only available within the areas in which they have already deployed fiber.[29] Thus, for some properties, there are no CFB providers available to offer broadband service. Furthermore, even within their existing fiber footprints, CFB providers often will only serve selected properties that they determine can meet their internal rate-of-return requirements.[30]

2. The State of Competition in the Commercial and Retail Real Estate Industry.

Owners, managers, and developers of commercial and retail real estate also operate in a competitive environment and must respond to tenant demand in much the same way as apartment owners respond to their residents. While less mobile than apartment residents, commercial and retail tenants can and will move if they are unable to obtain service from the broadband provider of their choice because of the impact it can have on providing a high level of service to their customers. Consequently, property owners will routinely grant multiple providers the right to serve their buildings in order to meet tenant requests.

This is not to say that such accommodation is necessarily always easy: broadband equipment takes up space inside the building. One provider is easy to accommodate; five or six or more may not be. When equipment closets become overcrowded, space may be found, but not necessarily at no cost to the property owner. Every square foot of space inside the building has potential value, so accommodating the needs of multiple providers should not be assumed to

[29] A. Smith Decl. at ¶9; K. Smith Decl. at ¶8; Sadler/Pye Decl. at ¶11; Yeh Decl. at ¶9; Knutsen Decl. at ¶9; Austin Decl. at ¶7.

[30] For example, in responding to the *NOI*, Starry, Inc. ("Starry") implied that it has an internal threshold of 75 units above which it seeks to serve. Comments of Starry, Inc., GN Docket No. 17-142 (filed July 24, 2017), at 5. *See also*, A. Smith Decl. at ¶9; K. Smith Decl. at ¶8; Yeh Decl. at ¶9; Sadler/Pye Decl. at ¶10; Knutsen Decl. at ¶9; Austin Decl. at ¶7.

be cost-free to the owner. A more significant problem than closet space, especially in older buildings, is finding duct and riser space to reach the tenant's premises. The cost of cutting through the core of the building to enlarge riser capacity is substantial, to take just one example.

Thus, when any broadband provider requests access to a property, with the support of an existing or prospective tenant, that request will be taken seriously and is very likely to be granted. Nevertheless, there are sound business reasons, having nothing to do with the questions raised in the *NPRM*, for which a commercial or retail owner might reject a request.

D. Property Owners Frequently Fund the Deployment of Broadband Facilities.

Property owners are not merely passive participants in the marketplace for broadband services, waiting for providers to deploy. There are approximately 20.8 million apartment units and 5.6 million commercial buildings of all types, including 1 million office buildings, in the United States.[31] These buildings generally require access to both fixed and mobile broadband service. In many instances, property owners invest their own capital in broadband infrastructure to make sure that residents, commercial and retail tenants, as well as visitors have access to the services they want.

1. Owners Invest in Inside Wiring to Support Broadband Service.

The Declaration of Steve Sadler and Henry Pye, attached as Exhibit D, contains detailed information regarding the costs of installing broadband facilities in both existing and newly-

[31] Statistics for commercial and office buildings: U.S. Energy Information Administration, 2012 Commercial Building Energy Consumption Survey (CBECS), Table B1 (revised Dec. 2016), available at https://www.eia.gov/consumption/commercial/data/2012/bc/cfm/b1.php. Statistics for apartment units: NMHC tabulations of 2017 American Community Survey microdata.

constructed apartment communities.[32] The following is a summary of their description of how much of that cost is borne by the owner and how much by the provider in different scenarios.

In new construction, in general, the owner will typically bear 85% to 90% of the in-unit and home-run wiring cost. Within the apartment units, wiring costs borne by the owner can range from $500 per apartment to as much as $1,200 per apartment. This will depend on construction type, apartment configuration, the owner's desire to provide a higher or lower level of wiring flexibility within the apartment, and the number of providers being supported. Unless fiber is extended all the way to the apartment, the owner is usually responsible for all cabling from the intermediate telecom room to each apartment's low voltage distribution panel. Coaxial or Cat-6 wiring generally costs between $80 and $120 per apartment. Some providers will provide the home run cabling material and ask the owner to install that material for them. Some providers will offer a cost offset for this labor but typically is only about half of the actual cost.

The service provider is generally responsible for the distribution/backbone wiring, but CFB providers in particular often require the owner to contribute to this cost. In any case, each provider's distribution and backbone network requires owner-provided conduit. The cost of this conduit may equal or exceed the cost of the wiring itself.

In an existing building, the service provider will usually retrofit service to one location in each unit. Any other costs, including inside wiring upgrades, are exclusively borne by the owner. The owner is also responsible for any new or additional power requirements. The general cost of upgrading or overbuilding existing wiring within an apartment unit is $100 to $150 per location.

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[32] The Real Estate Associations do not currently have specific information regarding the costs of such installation in office buildings, retail properties or other commercial properties, or regarding the proportion of those costs borne by property owners. We may provide such information later in this proceeding.

The additional cost to add a power outlet within an existing apartment unit is between $150 and $300 per location.

The two other costs related to overbuilds and upgrades are oversight by the management team and building repair and landscaping. The management team must manage access to each building, floor and unit, as well as oversee the entire process and communicate with the residents. While the service provider is theoretically responsible for returning the community to the same state it was in before construction, there are always items left to the property owner to correct, at its expense.

2. Owners Invest in Distributed Antenna Systems to Support Wireless Service.

Many property owners have also spent substantial sums to ensure access to mobile wireless service, by paying for the construction of in-building DAS facilities.[33] The Real Estate Associations are not aware of nationwide, publicly-available information on the total amount of that investment, but we can say that the typical cost of an in-building DAS designed to serve an apartment community or office building can range from a quarter of a million to more than one million dollars.[34] Wireless carriers rarely agree to fund the cost of construction of such facilities, even though the purpose of the infrastructure is to serve their customers.[35] The pressure on property owners from their residents, commercial and retail tenants is such, however, that

[33] *See, e.g.,* Comments of National Multifamily Housing Council, *et al*, WT Docket No. 19-71, at 8 (filed June 3, 2019). In a survey of its members conducted by the National Multifamily Housing Council for the purpose of the recent OTARD proceeding ("*2019 NMHC Survey*"), 42% of respondents reported that they had installed a DAS at at least one property. *Id.*

[34] Comments of National Multifamily Housing Council, *et al*, WT Docket No. 19-71, at 8 (filed June 3, 2019).

[35] *See,* Sadler/Pye Decl. at ¶¶ 31-33.

thousands of in-building DAS facilities have been built, almost entirely at the expense of property owners, in the last 10 years. If we assume as a rough, conservative estimate that 1000 DAS's have been built at an average cost of $500,000 each, then the real estate industry as a whole has invested $500 million dollars in broadband infrastructure. We suspect that this number is actually low. While that may be small compared to the overall cost of building multiple wireless and fiber optic networks across the continent, it is by no means trivial, and it is in effect a subsidy by property owners of the communications industry.

Recognizing that MTE residents, commercial tenants and their customers want and need access to WiFi,[36] property owners have also invested substantial sums in WiFi systems, booster systems, and other types of infrastructure at their properties.[37]

[36] According to the *2017 NMHC/Kingsley Renter Preferences Report*, 65% of renters found pre-installed WiFi in their unit very appealing (rated at a 4) and an additional 9% would not rent without it. In regard to community WiFi, 60.5% rated as very appealing (rated at a 4) and 8.8% would not rent without it. *2017 NMHC/Kingsley Renter Preferences Report*, https://www.nmhc.org/research-insight/research-report/2017-nmhc-kingsley-apartment-renter-preferences-report/.

[37] In the *2019 NMHC Survey on Broadband Deployment and Wireless Infrastructure (OTARD)*, 25% of respondents reported having deployed property-wide WiFi in at least one apartment community, 33% have deployed booster systems, and 8% have constructed fiber optic networks (other than DAS). *See*, Comments of National Multifamily Housing Council, *et al*, WT Docket No. 19-71, at 8 (filed June 3, 2019).

II. THE NPRM FAILS TO ASK IMPORTANT QUESTIONS NECESSARY TO FULLY UNDERSTAND THE ISSUES IT SEEKS TO ADDRESS.

There are many obstacles to the deployment of broadband networks. The real estate industry is very conscious of and indeed sympathetic to the concerns of broadband providers,[38] because property owners and developers are also in the infrastructure business. Property owners build and maintain infrastructure and depend on infrastructure – public rights-of-way, sewer and water connections, electric and gas utility service, telecommunications, video and broadband facilities – to meet the needs of their residents, commercial and retail tenants. We live in an increasingly complex world, and business leaders require great skill and effort to navigate that complexity.

The *NPRM*, however, simply does not capture the full complexity of the arena it seeks to examine. The Real Estate Associations recognize that the *NPRM* acknowledges many of the points made by the real estate industry in response to the *NOI* in this docket. Nevertheless, if adopted, the regulatory proposals under consideration will not advance deployment in MTEs in any meaningful way because they are driven by the complaints of a handful of commenters earlier in the docket, rather than by a full understanding of the factors that actually promote or hinder deployment and competition. Nor has the Commission articulated clear policy goals for what might constitute acceptable deployment or competition.

[38] Throughout these comments we will refer to the following different types of broadband providers: (i) franchised multi-system cable operators ("cable MSOs"); incumbent local exchange carriers that offer a fiber-based broadband product ("LECs"); competitive fiber broadband providers ("CFB providers"); and private cable operators, which are satellite-based video providers that offer broadband service and are not affiliated with a LEC or other entity ("PCOs").

A. The Calls for Regulation in the NPRM Are Based on Flawed Premises.

There are five major flaws in the *NPRM*. Any further action by the Commission that does not acknowledge these flaws is unlikely to accomplish the stated goals of the proceeding.

First, as just noted, the *NPRM* seems to arise largely out of the complaints of a few new CFB providers about the cost and difficulty of deployment in the face of existing competition. We understand the temptation to seek government help under those circumstances, but the mere existence of an incumbent or of relationships between incumbents and third parties does not mean that the market is operating unfairly. It is up to each new competitor to demonstrate that there is a demand for its service and to work cooperatively with owners and developers to deliver it. This may take time and success is never guaranteed.

Second, the *NPRM* fails to consider a fundamental economic question: How many providers is enough? If the broadband market is saturated, there may simply not be enough demand to justify the deployment of more infrastructure. The answer may well vary from place to place, but that is not a reason for government regulation, it is a call for sound business judgment by potential competitors about exactly where, when, and how much to invest. The Real Estate Associations fully understand this risk: if a property developer misjudges the real estate market and invests in a building but cannot attract enough residents, commercial or retail tenants to cover the cost of that investment, bankruptcy may well follow. It is unfortunate when that happens, but it is also a necessary mechanism for the efficient direction of capital in a healthy economy. Like the real estate industry, the broadband industry is capital intensive. At some point, it becomes impossible for a given market to sustain additional competitors profitably, yet the *NPRM* seems to assume that the mere claim that a provider seeks to enter the

market entitles that provider to some form of government relief, without considering the existing level of competition.

Third, the *NPRM* presumes that the business transactions under examination might hinder access to MTEs but does not consider the full scope of the problem. Large numbers of Americans live in areas where there is only a single wireline broadband provider, or none at all. That is where the government's efforts should be directed. When that problem has been addressed, perhaps it will be time to consider whether there are not enough providers serving apartment buildings or other commercial and retail buildings and ways to incentivize provides to serve properties that lack choice despite the desire of the property owner. These comments will show that a very high proportion of apartment residents have access to two or more wireline broadband providers. Furthermore, those residents often have access to very high speed service. A substantial and growing number also have access to high quality, reliable wireless service by means of a distributed antenna system ("DAS") or a similar technology. The real estate industry has made this possible through hard work and at great expense and is working constantly to expand choices for residents of apartment communities.

Of course, the Commission, other federal agencies, and the states have programs aimed at addressing rural deployment. We applaud those efforts. There are, however, many areas of this country that do not meet the standards for those programs and in which single-family residents only have one choice. In addition, most residents of single family communities – even the wealthiest in the country -- have two wireline choices and will never have more because of the economics of building networks and serving customers. So do most apartment residents and businesses in this country. The Real Estate Associations respectfully suggest if the majority of

apartment residents are in the same or better position as the majority of single-family residents, this proceeding is simply unnecessary.

Fourth, many of the proposals under consideration suggest that property owners have a financial incentive to impede broadband competition or seek to profit from making broadband service available. As we will show, this is fundamentally untrue. In fact, because property owners are actually underwriting deployment, further Commission regulation may very well reduce overall infrastructure investment.

Finally, although the title of this proceeding is "Improving Competitive Access to Multiple Tenant Environments," the *NPRM* asks no questions about the difficulties apartment, commercial and retail property owners sometimes face in attracting competitive providers.[39] We think such questions matter because nowhere does the *NPRM* suggest that the new competitors should have any corresponding duties. The cable MSOs are typically subject to build-out obligations under their local franchises, although they are not necessarily required to extend service inside a building upon request. Still, without those build-out requirements there might be many apartment buildings today with only satellite service as an option. The LEC broadband networks are also often subject to local build-out obligations, although those obligations and networks are typically not as ubiquitous as those of the MSOs. The CFB providers have no

[39] We focus here on apartment owners because we perceive that to be the primary focus of the *NPRM*, and because many years ago it was established that there is no evidence of a significant problem with providers getting access to commercial buildings. Real Access Alliance Comments, WT Docket 99-217 and CC Docket 96-98 (filed Aug. 27, 1999), at 1-26; Real Access Alliance Further Comments, WT Docket 99-217, CC Docket 96-98, and CC Docket 88-57 (filed Jan. 22, 2001), at 2-25; and Real Access Alliance Further Reply Comments, WT Docket 99-217, CC Docket 96-98, and CC Docket 88-57 (filed Feb. 21, 2001), at 7-14 (discussing survey of business tenants finding among other things that 95% of surveyed business tenants have never had building management deny them their choice of telecommunications provider).

build-out obligations at all. And the state mandatory access laws that are in place allow some providers to pick and choose which buildings to serve, while giving owners no corresponding right to demand service.

Further regulation along the lines suggested by the *NPRM* will favor a handful of providers without meaningfully (if at all) increasing the number of apartment residents, commercial or retail tenants who have access to broadband service or competition.

B. The Commission Should Establish National Goals and Priorities for Broadband Deployment that Are Based on a Balanced Understanding of Actual Relative Need.

The *2018 Broadband Report* states that, as of the end of 2016, 92.3% of the population of the United States had access to fixed terrestrial broadband service at speeds of 25 Mbps downstream and 3 Mbps upstream.[40] It also appears that 44% of the entire population has access to two wireline broadband providers (typically the cable MSO and the ILEC),[41] and 14.2% have access to more than two such providers. Unfortunately, there appear to be no public figures regarding either (i) the proportion of Americans living in single-family housing that have access to broadband service, as compared to apartments and other multi-tenant environments; or (ii) the

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[40] *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, GN Docket No. 17-199, 33 FCC Rcd 1660, 1681 (2018) ("*2018 Broadband Report*"); *see also In the Matter of Communications Marketplace Report, The State of Mobile Wireless Competition Status of Competition in the Market for the Delivery of Video Programming, Status of Competition in the Marketplace for Delivery of Audio Programming, Satellite Communications Services for the Communications Marketplace Report*, GN Docket No. 18-231, WT Docket No. 18-203, MB Docket No. 17-214, MB Docket No. 18-227, IB Docket No. 18-251, Report, 33 FCC Rcd 12558, 12655 (2018) ("*2018 Consolidated Market Report*") (91.9% of the population of the United States had access to fixed terrestrial broadband service at speeds of 25 Mbps downstream and 3 Mbps upstream).

[41] *2018 Consolidated Market Report*, at ¶187, Fig. D-4.

proportions of Americans living in different types of housing who have access to more than one wireline provider.[42] It would be very interesting to know, for purposes of this proceeding, whether Americans living in apartments have access to competitive service at higher rates than single-family residents. The information we provide in Part V.B suggests that roughly 80% to 90% of apartment residents have access to at least two providers and roughly 7% to 25% have access to three or more.

Furthermore, neither the current record nor the *NPRM* contain quantitative evidence that the two main factors the Commission uses in other contexts to analyze the state of competition in the fixed broadband market -- the actual number of broadband providers offering service and the available speeds of such service -- are different for residents living in apartment communities than for residents of single-family housing.[43] Presumably, this is because the Commission has not asked for the information in that form. Nor does the Commission have any information about the numbers of properties subject to the various types of contract terms addressed by the *NPRM*, although these comments attempt to close that gap.

The Real Estate Associations believe that these numbers are not just interesting or important, but essential to understanding the issues the *NPRM* proposes to address. We believe

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[42] A recent Commission document notes that "there is a dearth of empirical evidence concerning the differences in broadband subscription rates between MTE and non-MTE residents." S. Kauffman and O. Carare, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments*, Federal Communications Commission, Office of Economics and Analytics (July 2019), (the "*Mandatory Access Report*") at 1. Unfortunately, although the *Mandatory Access Report* makes certain findings about the proportion of MTE and non-MTE residents who subscribe to broadband service, which we address below at Part VI.G, the report does not address the level of competition in MTE versus non-MTE environments.

[43] The *Mandatory Access Report* finds that the national broadband uptake rate in non-MTE households is 83.8% and 80.4% in MTE households, but again, says nothing about access to competition, which is ultimately the issue in this proceeding. *Mandatory Access Report* at 6.

that it is also important to have better information about the speeds of service available in different types of housing. Without this information, it is not possible for the Commission to determine whether regulation of the terms of agreements between property owners and broadband providers is necessary or whether any regulations that may be adopted will be reasonably tailored to achieve their intended results.

The Real Estate Associations also believe that the current record in this docket, as the *NPRM* itself describes it, certainly suggests that new regulations are not needed.[44] While this is encouraging, the lack of perspective on how the apartment market compares to the larger market will result in skewing incentives at the expense of both apartment residents and the population as a whole.

Furthermore, the record in this proceeding to date reflects claims by certain providers regarding their ability to obtain access to buildings where there is already a provider present, not to buildings where there is no service or to areas where speeds are low.[45] In other words, the

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[44] NPRM, ¶¶ 17, 27.

[45] *See, e.g.*, A. Smith Decl. at ¶¶8-12 (Describing instances where invitations to providers were declined, including one where (i) both Verizon and DISH Fiber declined an invitation to provide high speed Internet service in an MTE unless owner entered into a bulk service agreement, Verizon going as far as to cite as a reason "because the properties were in 'discretionary' areas where Verizon 'was not obligated' to deploy FiOS;" and another (ii) where when the Owner's agent contacted Verizon "about delivering FiOS to another client's portfolio located in various Verizon territories in Maryland, Delaware and Pennsylvania. Out of more than two dozen communities that Verizon currently services with copper facilities and DSL service, Verizon was only was only interested in upgrading to fiber at 4 of them."); Yeh Decl. at ¶9 ("[W]e have reached out to numerous ISPs about deploying to our garden-style communities that we know are within these providers' footprints. However, those ISPs have declined such opportunities and told us that deploying to garden style communities is too costly from their perspective due to the physical layout of such communities.")

competitive providers are not trying to solve the more pressing problem, which is to extend service where it does not exist or where it is substandard.

In the face of this lack of information, the Commission must resist any temptation to rely on anecdotal evidence. Instead, we urge the Commission to build a foundation for effective regulation, if any is actually needed, by obtaining the necessary information. This is especially important, because as noted above, the essential questions are susceptible of quantification.

Currently, the Commission does not collect data which would permit the Commission to distinguish between residents of MTEs and residents of non-MTEs for purposes of determining the state of the fixed broadband market. Without this information, it is difficult to establish how many Americans living in apartments have access to competitive service, compared to the number of Americans in single-family housing. If the proportion of apartment residents is higher – as we believe it is – what is the justification for regulation, regardless of the types of contracts used or their terms? The same question arises as to the speed of service. If apartment residents typically have access to higher speeds than single-family residents, this suggests that deployment in the current environment is working. What is the rationale for regulation in those circumstances? Rather than interfere with a market that is working, and encouraging the investment of more capital for relatively little gain, we believe a more sensible policy would be to encourage that investment to flow to areas where there are gains to be made.

In addition, the Commission should attempt to determine whether new regulation of agreements between apartment owners and broadband providers could hinder access to the fixed broadband market as a whole or in those other segments of the population.

For example, if regulation were to transfer certain costs from broadband providers to building owners, this could tip the scale for new investment away from non-MTEs in favor of

MTEs. This outcome could be particularly problematic if providers are encouraged to seek to be the second or third provider for an MTE, rather than extending service to a resident of a non-MTE that is one of the six percent that has no fixed broadband providers or one of the 37% with access only to speeds of 250Mbps/50Mbps.

Furthermore, regulation that impedes an apartment owner's ability to negotiate for things like service standards, minimum speeds, and similar contract terms has the potential to actually lower the quality of broadband service available to residents. Owners currently have the ability to obtain enforceable commitments from broadband providers to provide minimum speeds that far exceed the FCC's minimum of 25mbps/3mps.[46]

Owners are in a unique position, because – in some cases -- they have both the incentive to push for better speed and service terms and the bargaining power to get them. This is generally not the case in smaller properties serving lower income residents, however, unless the owner negotiates a portfolio-wide arrangement, in which the provider agrees to extend between service terms to properties it might not otherwise be willing to serve, in return for access to properties that will generate a higher return on its investment. This is also an opportunity unavailable to single-family residents, who generally have no choice but to select from whatever options the provider decides to offer.

For all these reasons, limiting an apartment owner's ability to seek enforceable commitments beyond financial compensation could actually slow the growth in the percentage of the population with access to higher speeds.[47]

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[46] *See, e.g.,* Austin Decl. at ¶¶5,6,21; K. Smith Decl. at ¶25; Yeh Decl. at ¶24; Hubacher Decl. at ¶15.

[47] The *NPRM* adopts a broad definition of "revenue sharing," which is apparently intended to capture any and all consideration a provider might be obligated to tender under an agreement

In summary, while the Commission has access to evidence regarding the state of the broadband market as a whole, there is scant quantitative evidence in the current record regarding the state of fixed broadband markets or the needs of apartment residents as compared to all Americans. Rather than attempting to impose rules which apply to one specific segment of the US population based purely on anecdotal evidence, the Commission should gather the data needed to properly analyze the MTE market, as compared to the single-family market, in all relevant respects, including the proportion with access to broadband service, the proportion with access to competition, the number of competitors, and connection speeds. With this information in hand, the Commission would be able to establish national goals and priorities for broadband deployment and determine whether regulation in a particular market sector was actually needed, based on a truly complete and through record.

C. The *NPRM* Pays Insufficient Attention To the Reasonableness of the CFB Providers' Business Plans and Their Approach To Dealing with Property Owners.

As described in Part I, the apartment industry spends very large amounts of money to create new communities. The $315 million dollar O Street Market redevelopment is not unique, and even smaller, more typical projects involve investments of tens of millions of dollars. The apartment industry contributes $92.6 billion annually to the U.S. economy as a result of new construction.[48] The Real Estate Associations, and every property owner, realize that the value of

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with a building owner. Building access agreements of various kinds, however, often obligate the provider to meet specified minimum broadband service speeds. For example, Equity Residential reports that gigabit speeds are common at its properties, and that in new construction this has been a priority. Austin Decl. at ¶¶ 5, 6, 21.

[48] Dr. Stephen Fuller, "*The Trillion Dollar Apartment Industry,*" available at https://www.nmhc.org/uploadedFiles/Articles/Research/FullerReportFinal.pdf (Feb. 2013).

these new communities would be vastly reduced if property owners did not have a symbiotic relationship with broadband providers. Every one of those new apartment properties must have broadband service if it is to be successful.

This does not mean, however, that broadband providers should have any special rights to use the property of third parties to advance their own business plans. We still live in a market economy that respects private property, and we are confident that every broadband provider in the country expects its own property rights to be respected and would object to its property being used by a third party without its consent. In fact, it was only after the Commission relieved the LECs of their unbundling obligations that those companies made the commitments to investing in fiber networks that have led to their current penetration rates in apartment buildings across the country.[49] The fact that some new entrants believe that it is in their interest to seek government help in advancing their business plans does not mean that it is a good idea.

Regrettably, the *NPRM* seems to give too much credence to just the opposite notion. While the *NPRM* does acknowledge that the findings of the 2010 *Exclusive Contracts Order*[50] largely remain valid, it also questions many of those key findings based solely on the complaints of a few new CFB providers, whose position seems to be that they have a right to compete in any building they choose, and that any private agreement that they imagine might get in the way is somehow illegitimate. In reality, the opposite is true: in a market economy, private contracts are presumed to be legitimate, in the absence of law to the contrary. We address the Commission's

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[49] The City of San Francisco and about a third of the states have granted special rights to some types of providers, but as we discuss in Part VI.G, the rationale behind those laws is out-of-date.

[50] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order 2460 (2010) ("*2010 Exclusive Contracts Order*").

legal authority in Part IV, but here we note simply that the *NPRM* implicitly gives credence to the assumptions of these providers, without examining the reasonableness of the providers' business plans or their approach to dealing with property owners. The *NPRM* asks many questions about contract terms and the behavior of property owners, based on the providers' complaints, but invites no examination of the providers themselves. We are presented with a range of questions, all aimed at ascertaining whether certain contract terms should be regulated in some fashion. But why is that? What is the Commission trying to achieve?

As discussed in the preceding section and throughout these comments, there is a great deal of evidence that there is ample competition inside apartment buildings today. This stands to reason, because the apartment market is much denser and therefore more cost effective to serve. But nothing in the *NPRM* addresses these points. Nor does the *NPRM* invite any discussion of the underlying economics of serving the MTE market.

For example, here are some questions that the Real Estate Associations believe are pertinent:

- What is the policy goal underlying the *NPRM*?
- Does the Commission have a definition of what would constitute sufficient or effective competition in MTEs?
- How many providers does the Commission believe can profitably serve a property? Is two enough? Three? Or more?
- If it is up to providers to decide whether they want to serve a property (to which we do not necessarily object) even if they may end up losing money, should the Commission adopt rules that reduce their cost of entry? If so, why? Again, what is the goal?
- Are the various complaining providers turning a profit on their current operations? If not, is it the Commission's duty to make sure they do?

If the Commission has no answer to these and similar questions, then further regulation is unreasonable because the Commission has not established the actual goals of its policy.

The Real Estate Associations believe it is especially significant to know whether the complaining providers are turning a profit. If they are not making money, is it because of some flaw in the market, or is it because they have chosen to enter a capital intensive business that is already occupied by providers who have made the necessary investment? Because it is a capital intensive business, and there are already two incumbent wireline providers in most markets in the country, it is bound to be harder to succeed today than it would have been in the past. But that is not a reason to regulate the current market, at least not unless there has been a determination that it is uncompetitive in ways that the proposed regulations can address.

Here are some additional questions: How many of these new providers are chasing the same opportunities? The Real Estate Associations strongly suspect that they are all aiming primarily at larger properties with high-income residents; there is little evidence that their business plans include serving a significant number of middle-income properties, much less affordable/workforce housing. Are they all entitled to succeed? If not, then perhaps the Commission should allow the market to sort things out. In a free market, capital will be directed to those that do succeed, and the successful companies will be those that concentrate on building a product and a reputation that wins them customers over time. That is how businesses are built for the long term.

On the other hand, there may be segments of the industry in which the market is not able to generate competition, for whatever reason. In those instances, Commission may conclude that appropriate regulation may encourage providers to build in locations that currently lack competition, just as it is working on rural deployment. But the proposals in the *NPRM* are not tailored to that goal.

III. THE COMMISSION'S COMPLEX INSIDE WIRING REGIME TREATS DIFFERENT CLASSES OF PROVIDERS DIFFERENTLY AND LEADS TO DISPARATE TREATMENT.

The Commission has never adopted general rules governing the wiring used to deliver broadband services inside apartment, commercial or retail buildings. The current inside wiring regime is a patchwork under which providers fall into different regulatory categories for historical reasons that have nothing to do with the nature of the service or the technical characteristics of the wiring. It is no surprise that providers have adopted different business strategies based on their treatment under this inconsistent system. The Real Estate Associations believe that it is essential to understand, acknowledge, and account for these differences before the Commission adopts any further regulation, because the current structure is already distorting the market.

After reviewing how wiring in buildings is currently regulated, with emphasis on apartments because exclusivity agreements are simply not an issue in the commercial market, we will explain how the proposals for regulation in the *NPRM* fail to account for the disparities and distortions that already exist because of the Commission's outdated wiring rules.

A. Under Current Law, Wiring that Is the Property of the Building Owner Is Unregulated.

Wiring, fiber optic cables, and other facilities owned by building owners and used to provide high speed broadband service inside their communities are currently, and should remain, unregulated.

There are two exceptions to this statement. The first is that, as noted in Part II.C, below, Part 68 of the Commission's rules still governs copper telephone wiring on the property owner's side of the demarcation point. Although that wiring is still being used to deliver broadband

service in many buildings, it is technologically obsolete. Consequently, at least over the long term, it appears that such wiring is of no practical consequence to the issues raised in the *NPRM*.

The second exception to this statement applies only in the City of San Francisco, where Article 52 of the San Francisco Police Code interferes with the owner's rights. Except to the extent limited by the Commission's recent declaratory ruling,[51] Article 52 currently grants certain providers the right to use wiring owned by the building owner, even if the owner objects, and even if the owner has granted another entity the right to use that wiring. Article 52 does not apply to wiring owned by a cable MSO, a LEC, a CFB provider, or any other person. As with the Commission's multiple sets of wiring regulations below, this kind of disparate treatment distorts the market, and is one reason that Article 52 should be completely preempted.

In any event, aside from Article 52, under current law, if an apartment, commercial or retail property owner chooses to install fiber optic facilities in a building at its expense and retains title to those facilities, those facilities are unregulated. The same applies to wiring that may have been installed by a third party, but is now owned by the property owner, whether by contract or operation of law. This is a reasonable and logical result. As long as the property owner itself is not providing broadband services there is simply no reason for that activity to be regulated. If the property owner invests in wiring that providers choose not to use, then the owner made a bad business judgment and must absorb the costs; conversely, if providers are willing to use the wiring, then both parties should be allowed to benefit. Therefore, allowing property owners to install broadband cabling at their expense encourages the deployment of broadband facilities. Indeed, as we discuss further in Part VII, below, there is no policy reason

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[51] *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, Declaratory Ruling, MB Docket No. 17-91 (rel. July 12, 2019) (the "*Article 52 Declaratory Ruling*").

that an owner should not be permitted to charge a provider for the use of that wiring. The fact that owners frequently do not charge for the use of wiring that they own is itself the truly significant point.

B. The Commission's Cable Inside Wiring Rules Are Cumbersome and Over Time Have Discouraged Cable Operators from Retaining Ownership of Wiring Inside Buildings.

The Commission first adopted 47 C.F.R. § 76.801 to govern wiring owned by cable operators in response to Section 624(i) of the Communications Act, which was added by Section 16(d) of the 1992 Cable Act.[52] When the Commission decided to extend the rule to wiring inside apartment buildings, the real estate industry objected on various grounds.[53] One significant concern at the time was that the proposed (and final) rule did not recognize the fundamental differences that arise between single-family homeowners and apartment residents because of their differing property rights. Nevertheless, the Commission proceeded to amend 47 C.F.R. § 76.801 and adopt its current rules, which appear at 47 C.F.R. §§ 76.801 – 806.

Under these Part 76 rules, inside wiring owned by a cable MSO is broken down into two elements: "cable home run wiring" and "cable home wiring." At one time, the cable MSOs preferred to own at least the cable home run wiring, if not all of the wiring inside an apartment building. Over time, however, this has changed and today the cable MSO typically no longer owns any inside wiring at a given property. We explain here why this has happened.

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[52] *Implementation of the Cable Television Competition and Consumer Protection Act of 1992: Cable Home Wiring*, Report and Order, 8 FCC Rcd 1436 (1993).

[53] Joint Comments of the Building Owners and Managers Association, the National Realty Committee, the National Multi Housing Council, the National Apartment Association, the Institute of Real Estate Management, and the National Association of Realtors, MM Docket 92-260 (filed Mar. 28, 1997) at 2-9.

One of the reasons that the apartment industry initially objected to the Commission's rules was that the rules gave control of the cable home wiring inside each unit to the individual unit residents.[54] This made little sense to owners because (i) residents do not own any other elements of the physical infrastructure in an apartment community; and (ii) apartment residents move frequently and therefore do not have the same interest in controlling wiring that owners of single-family housing do. Indeed, it is because of the operation of 47 C.F.R. § 76.802 that apartment owners today control essentially all such wiring, regardless of who paid for it at the time of installation.

47 C.F.R. § 76.802(b) states:

> Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: it gives the subscriber the opportunity to purchase the wiring at the replacement cost; the subscriber declines, and neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided reasonable advance notice to the incumbent provider that it would purchase the cable home wiring pursuant to this section if and when a subscriber declines. If the cable system operator is entitled to remove the cable home wiring, it must then remove the wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

The problem is obvious. As noted in Part I.C, roughly half of apartment residents move every year. When they move, residents "voluntarily terminate" service. Under the rule, the existing wiring must stay in place[55] because even if the cable MSO could reach the now-former resident to offer to sell the wiring at replacement cost, no sane former resident would accept the offer. Nor would it be practical or sensible for the MSO to remove the wiring within seven days

[54] *Id.*; 47 C.F.R. § 76.802.

[55] Of course, this is desirable to both the owner and cable MSO in any case, because of the cost and disruption of removal.

or any other period. Consequently, control of the wiring in essentially every case passes to the building owner because the cable MSO's rights in the wiring have been vitiated by the rule.

If the analysis were to end there, one might argue that this is not necessarily a problem. Cable MSOs own but do not control wiring inside units, so the wiring is available for competitors, as intended. Furthermore, under 47 C.F.R. § 76.804, the Commission has provided a means for competitors to get access to cable home run wiring. But has it? Setting aside the extremely cumbersome and ultimately impractical nature of the procedures laid out in 47 C.F.R. § 76.804, the Commission itself ensured that the rule would become a dead letter.

In 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(mm), the Commission drew the line between cable home wiring and cable home run wiring at a point twelve inches outside the unit, or the nearest practically accessible point. The practical difficulty of locating this "demarcation point," which is normally buried behind walls, and then managing the transfer of control of the home run wiring from one provider to another, severely undercut the practical utility of the rules. Consequently, when RCN requested that the Commission clarify the definition of the demarcation point, the Commission effectively rewrote the rule to address RCN's concerns in the so-called "*Sheetrock Order*."[56] By moving the demarcation point well back from the unit, essentially to the cable junction box on each floor or in the basement of the building, the *Sheetrock Order* converted most cable home run wiring into cable home wiring. Thus, for practical purposes, the cable MSOs lost control of all inside wiring they owned. As residents moved out and the notice and transfer provisions of Section 76.802 were triggered, the rules

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[56] *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003).

themselves deprived the cable MSOs of their rights in the wiring. Of course, they also removed any incentive the MSOs had to maintain the wiring or to invest in new wiring. From this it follows that the cable MSOs also lost any incentive to own wiring in new construction. The only party left to oversee wiring installed before the *Sheetrock Order* took effect was the property owner. And in the decade and a half since the *Sheetrock Order* was released (if not before) cable MSOs have avoided taking title to new wiring, even if they pay for it and install it. **Note:** <u>This happened by operation of law under the Commission's existing rules</u>.

In theory, property owners now control all of this existing wiring, but do not hold title. Two unrelated factors still remain to consider. First, in the absence of a clear contractual provision to the contrary, the state law of fixtures would generally state that infrastructure like wiring that is attached to a building is deemed a fixture, and becomes the property of the building owner. Over the course of the 35 years since the 1984 Cable Act became law, it is fair to say that the vast majority of apartment buildings and cable systems have changed owners several times. If a cable MSO cannot produce a contract proving that it holds title to wiring inside building, there is a strong presumption under the law of fixtures that title is in the building owner. So for pre-*Sheetrock Order* construction, cable MSOs have a proof problem, and for post-*Sheetrock Order* construction they have simply never held title.

Second, for reasons having to do with the Commission's rate regulations and the tax treatment of wiring inside buildings, there was a period in which cable MSOs had other incentives for ceding any title in wiring inside buildings.

Thus – in the wake of the *Sheetrock Order* – the cable MSOs changed their position regarding control of inside wiring. Not only did they prefer that owners hold title to the inside wiring so that the MSO could contract with the owner for the exclusive right to use the inside

wiring, or at least the home run wiring portion, but in fact control, if not actual title had already passed to the owners under the law. This is a critical point: cable MSOs are not engaged in circumventing the Commission's rules when they either acknowledge that the owner has title to wiring or transfer title for a nominal sum. Such agreements merely clarify the actual, practical state of affairs. Furthermore, they have the very important practical effect of putting the MSOs in the same position as the ILECs.

The NPRM suggests at paragraph 25 that property owners or cable operators or both have engaged in attempt to circumvent the Commission's rules. This is incorrect. When adopted, the Commission's rules appeared to offer a way to allow for competition between providers on a unit-by-unit basis, or on a building-by-building basis. In practice, however, the rules have not worked as planned. The main reason for that, as we discuss in Part III.D, is that providers prefer to retain control over the physical facilities they use.

C. The Commission's Part 68 Rules Governing Telecommunications Wiring Are Outmoded and Essentially Irrelevant.

Part 68 of the Commission's rules apply to copper telephone wiring. This wiring can be used to provide DSL broadband service, but it is essentially obsolete. The LECs may seek to claim right of access to properties based on the existence of this wiring under certain circumstances, but as far as the Real Estate Associations are aware these rules never come into play in new construction and are rarely a factor in existing buildings.[57] In theory, the LECs can

[57] Under a combination of state law and Commission rules, the minimum point of entry for copper facilities may be placed at the user premises, or at the point of entry to the building. It is not clear, at least to the Real Estate Associations, what rights the LECS actually have under these rules with respect to their fiber facilities, as opposed to the rights they may actually assert. This is primarily an issue in older commercial buildings.

upgrade these copper facilities inside buildings to deliver broadband, but they rarely agree.[58] It does not appear that any of the CFB providers who are urging the Commission to give them access to buildings and wiring are seeking access to this type of wiring.

D. The Commission Has No Rules Governing Fiber Optic Facilities Located Inside Buildings and Owned by Providers of Broadband Internet Access Services, Including Common Carriers and Competitive Broadband Providers.

The Commission has deregulated fiber optic facilities constructed by the LECs.[59] Verizon, AT&T, and other providers that offer subscribers both broadband Internet access service and video programming packages, however, meet the definition of "multichannel video programming distributors" in 47 CFR § 76.801, and therefore would appear to be subject to the cable inside wiring rules. Nevertheless, those companies have never acknowledged that they are subject to the cable rules. Nor has the Commission made any statement to that effect, as far as the Real Estate Associations are aware. We believe this is an open legal question that should be resolved. Were the Commission to take up this issue, the outcome would say much about the Commission's commitment to developing a balanced and coherent wiring regulatory scheme.

In practice, the LECs insist on retaining title to all of the fiber optic cable and associated equipment that they install in an apartment community, up to the demarcation point at each unit. Typically, that demarcation point is established at wiring panels inside the units by agreement with the owner; this demarcation point, as far as we know, is unregulated and undefined in any Commission rule because it pertains to unregulated fiber facilities. In addition to holding title,

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[58] *See* A. Smith Decl. at ¶8; K. Smith Decl. at ¶21; Yeh Decl. at ¶8; Knutsen Decl. at ¶8; Austin Decl. at ¶6.

[59] *See*, Commission orders cited at *NPRM*, ¶ 8.

the LECs retain control of and the sole right to use all of this wiring. This point is nonnegotiable: the LECs will not sign an agreement that does not give them these rights.[60]

In new construction, AT&T & Verizon will typically bring fiber lines all the way to the wiring panels inside the units. These home-run fiber lines are owned by Verizon and AT&T and are not shared with third parties. Since the providers own the fiber home-runs and there is no mechanism for any third party to gain access to this wiring (as there is under Part 76) these LECs in essence have exclusive rights to use the home run wiring.

The competitive broadband providers are under the same unregulated scheme as the LECs. Any wiring they install inside a property is governed only by the terms of the contract, and those contracts routinely specify that the provider retains title to the wiring.

E. The NPRM Fails To Recognize the Disparate Effects of this Outdated Regulatory Scheme.

Nowhere does the NPRM address the disparate treatment of the cable MSOs that arises from the regulatory scheme described above, but that scheme creates significant and obvious inequity.

First, cable MSOs have no incentive at all to own inside wiring, because any wiring they were to install and retain ownership of would become subject to the Commission's Part 76 rules. That might be an acceptable outcome to the cable MSOs and to owners, notwithstanding the practical problems mentioned above, but the fundamental problem is that the LECs are not subject to the same rules. The LECs can insist on retaining title to wiring – and owners must agree, because the LECs simply will not negotiate on this point – and they never have to share it

[60] *See,* K. Smith Decl. at ¶13; Yeh Decl. at ¶12; Knutsen Decl. at ¶14; Austin Decl. at ¶19; Sadler/Pye Decl. at ¶15.

with anybody, under any circumstances. As long as this disparity exists, the Commission will not have a rational and equitable regulatory structure in place.

Some CFB providers understand, accept, and are able to work within this framework: they negotiate for the same rights as the LECs in their agreement with apartment owners, and they have the same rights under the Commission's rules, at least as far as the Real Estate Associations know, because the Commission has never clarified this point. (Incidentally, the real estate industry noted this disparity in comments in 2007, so this is a long-standing issue.)[61]

The bottom line is that exclusive wiring agreements put cable MSOs in the same position as the unregulated LECs and CFB providers.

In San Francisco, however, AT&T can still have exclusive wiring rights, but the cable MSO cannot if the MSO owns the inside wiring. Furthermore, Article 52 requires the owner to allow access to any wiring it owns, which means that the MSO or any other party who uses the owner's wiring cannot have exclusive use of that wiring, either. Thus, AT&T is protected, but Comcast, which holds a cable franchise, is forced to share wiring, whether it owns the wiring or it uses wiring owned by a building owner. Furthermore, because Article 52 only regulates building owners and not providers, it discourages building owners from investing in wiring. It is very difficult to see how this arrangement is anything but inequitable.

F. The Commission's Model State Code Creates Further Confusion.

Although in this docket certain CFB providers seem to argue for a policy that requires cable MSOs to own wiring and make it available to their competitors, in 2018 members of the same industry (if not the same companies) urged the Commission's Broadband Deployment

[61] Real Access Alliance Comments, MB Docket 07-51 (filed July 2, 2007) at 57-59.

Advisory Commission ("BDAC"), to adopt Article 7 of the "State Model Code for Accelerating Broadband Infrastructure Deployment and Investment" ("State Model Code").[62] That proposed legislation would essentially require property owners to install, at their expense, facilities suitable for the deployment of broadband services in all new and renovated buildings, and make those facilities available to all comers on demand.

In other words, setting aside the numerous problems with Article 7,[63] the policy of the BDAC seems to be to put wiring under the control of building owners, in direct opposition to the actual policies pursued by the Commission for the past 15 years, as described above.

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The entire field of inside wiring regulation is a morass, which we believe the Commission should never have entered. The current proceeding promises only to make matters even more complex and difficult to navigate.

[62] https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf

[63] The concerns of the real estate industry with Article 7 of the Model State Code are laid out in two ex parte letters filed in this docket, one from NMHC and NAA to Chairman Pai and BDAC Chair Bowles (filed July, 26, 2018), and the other from the Building Owners and Managers Association International, *et al.* to Chairman Pai and BDAC Chair Bowles (filed Dec. 5, 2018).

IV. THE COMMISSION IS ALREADY AT THE LIMIT OF ITS LEGAL AUTHORITY.

It is now well-established that the Commission's authority does not extend to the real estate industry. [64] Furthermore, at least in theory, any rules the Commission may enact in this proceeding will technically apply only to the affected communications providers.[65] Nevertheless, the focus of this proceeding brings that theory into question. Indeed, the title of this proceeding states clearly and directly that the issue at hand is "access to multiple tenant environments." It is therefore hard to see how the principal actors whose behavior is being examined are not building owners. This is very different from the original cable inside wiring proceeding, for example, where the focus was clearly on whether cable operators used their control over wiring to hinder competition. It is also different from the telephone inside wiring proceedings, which arose out of similar concerns. The Real Estate Associations therefore believe that, notwithstanding any precedent that supports the proposition that the Commission is engaged simply in regulating providers over whom it has jurisdiction, this proceeding should be recognized for what it is: overreaching by the Commission into an area that has not been entrusted to it by Congress.

In fact, there is precedent for addressing this kind of situation. The Commission did not venture into the regulation of pole attachments by asserting it was merely regulating the behavior of communications providers who wanted access to poles. Recognizing that in considering the regulation of electric utilities and other pole owners it was entering uncharted waters, the

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[64] "[T]he Communications Act does not . . . explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside the Commission's scope of authority." *Building Owners and Managers Association v. FCC,* 254 F.3d 89 (D.C. Cir. 2001).

[65] *Nat'l Cable & Telcoms. Ass'n v. FCC,* 567 F.3d 659 (D.C. Cir. 2009) ("*NCTA v. FCC*").

Commission specifically asked Congress for the power to regulate pole attachments. After a full and fair discussion of the issues, in which all parties concerned had the opportunity to present their views to the elected representatives of the people, Congress gave the Commission the necessary authority.[66]

Today, however, things are different. As noted in Part III.F., the BDAC, whose members included not a single representative of the real estate industry, adopted the State Model Code. Strictly speaking, the State Model Code is merely a recommendation of the BDAC, and the BDAC does not speak for the Commission. Nevertheless, the promulgation of Article 7 by a creature of the Commission naturally raises the question of whether Article 7 represents Commission policy. Has the Commission established such a plan as a goal? Is this proceeding a reflection or a means of reaching that goal? If so, the Real Estate Associations believe that the Commission should give the public notice and an opportunity to comment on its actual policy, rather than engage in further piecemeal regulation.

The Real Estate Associations show in these comments that providers and owners are acting rationally in an environment that has arisen from a haphazard set of Commission rules that developed for various reasons over many years. The reason those rules are haphazard is that the Commission has been piecing together authority from various sources as it has attempted to address a series of perceived problems. The Commission's authority has never been clear, because at every turn it has relied on statutes that were designed for a different purpose but broad

[66] The Pole Attachment Act was adopted because the Commission had concluded that it had no jurisdiction "to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities." Sen. Rep. 580, 95th Cong. 1st Sess., at p. 14, *citing California Water & Tel. Co., et al.,* 40. R.R. 2d 419 (1977).

enough to allow the Commission to proceed. Today, however, the Commission is at the end of its tether.

In the sections that follow we will address the possible sources of authority proposed by the *NPRM* and demonstrate that the Commission's authority can be stretched no further.

A. Section 201(b) of the Communications Act Gives the Commission No Authority Over the Terms by Which a Building Owner Allows a Provider of Broadband Service To Use Wiring Belonging to the Building Owner.

The NPRM asks whether Section 201(b) might authorize the Commission to regulate the terms of revenue sharing agreements, rooftop exclusivity clauses, or exclusive wiring agreements entered into by telecommunications carriers. There are two problems with such a theory. First, the plain language of Section 201(b) does not allow it. Second, the agreements at issue address broadband services, not telecommunications services.

Section 201(b) states: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . . ." The plain meaning of this statute is to authorize the Commission to regulate matters related to the provision of communications service, which is to say the relationship between the provider and the customer. The language is broad, in that "practices . . . in connection with such communications service" could be read to mean that any practice of a communications provider is somehow "in connection with" the service, because providing communications service is the business of the entity. But that would be unreasonable: Could the Commission argue that Section 201(b) grants it the authority to regulate the salaries of key executives of communications providers because compensation policies are "practices . . . in connection with" the provision of service? What about practices related to the health care of employees? Would Section 201(b) permit the Commission to regulate the rent property owners charge providers for office space? Extending

the scope of the statute beyond the relationship between provider and subscriber opens the door to an unlimited range of regulation and this is not be what Congress intended.

Furthermore, the language of the Act makes it clear that there are practices similar to those at issue in this proceeding that are not subject to Section 201(b), because Congress addressed them separately and specifically. For example, Section 224 gives the Commission express authority to regulate pole attachment rates. The rates paid by communications providers to pole owner are analogous to the fees paid to building owners, but when the Commission decided it needed to regulate pole attachments, it did not claim the authority existed under Section 201. Instead, the Commission specifically requested that authority from Congress.[67] The same reasoning applies here: to read Section 201 as granting the Commission full authority over every business practice of communications providers makes much of the history of the Communications Act incomprehensible.

Even if the text of Section 201(b) were broad enough to allow regulation of compensation or other "practices," the Commission's decision in the *Internet Freedom Order* removes the proposals in the NPRM from the discussion.[68] Because broadband Internet access service is not a telecommunications service, Section 201(b) does not apply to the facilities of CFB providers,

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[67] The Pole Attachment Act was adopted because the Commission had concluded that it had no jurisdiction "to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities." Sen. Rep. 580, 95th Cong. 1st Sess., at p. 14, *citing California Water & Tel. Co., et al.,* 40. R.R. 2d 419 (1977).

[68] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (2018) ("*Internet Freedom Order"*).

or cable MSOs, or even to LEC fiber optic facilities. It certainly does not apply to building owners who merely make their wiring available to broadband providers.[69]

Finally, the Commission no longer regulates what common carriers charge their subscribers, has deregulated cable rates, and has never regulated broadband rates – surely it would be bizarre for the agency to conclude that it can regulate this one type of transaction, especially in view of the evidence that some of those payments arise out of the operations of the Commission's own rules and that without such payments, providers would simply have to cover the full cost of infrastructure construction.

B. Section 628 of the Communications Act Does Not Authorize the Commission to Regulate Exclusive Wiring Agreements.

In *NCTA v FCC*,[70] the court held that the Commission could regulate exclusive access agreements because exclusive access prevented subscribers from getting access to programming offered by competitors.[71] This logic does not apply to exclusive wiring agreements, for two reasons. First, as the Commission has previously found, exclusive wiring agreements do not ban competition by their terms. In other words, exclusive wiring agreements present no legal barrier to the entry of a competitor for the purpose of selling services to residents. Second, they do not do so in fact. As we have described in Part III.C, exclusive wiring agreements, as the term is

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[69] We note here that the NPRM suggests that the Communications Act's commitment to universal service is a source of authority for action in this proceeding. NPRM, ¶ 33, n. 125. The Real Estate Associations suggest that this standard is irrelevant in this context, given that the proportion of Americans living in apartments with access to competitive broadband is higher than that of Americans in single family housing. But Section 254 is relevant in another context; *see* Part VII, point 4.

[70] 567 F.3d 659 (D.C. Cir. 2009).

[71] *Id.*

used in the *NPRM*, are used by cable MSOs to put themselves in the same position as the LECs, which also have exclusive wiring rights, under a different name. Furthermore, not only do a large majority of buildings host at least one competitor, but a similar percentage host both the cable MSO and the LEC broadband product.[72] If so many providers are able and willing to compete on these terms, then the question is not whether exclusive wiring hinders competition, but why the complaining providers are not willing to serve more widely.

Section 628 is not a general grant of authority to regulate building access. That statute only permits the Commission to act if a given practice causes a lack of access to programming. If there is a lack of access to programming today, it is because the economics of delivering service make certain categories of buildings unattractive to certain providers.

C. Section 628 of the Communications Act Does Not Authorize the Commission to Regulate Exclusive Marketing Agreements.

Section 628 does not apply to marketing agreements for the same reason it does not apply to exclusive wiring agreements: they do not bar competitors from serving subscribers. Here again, these comments offer ample proof of that fact.

D. Sections 253 and 332 of the Communications Act Have No Bearing on the Relationship Between Building Owners and Service Providers or Facilities Located on Private Property.

The NPRM asks "whether sections 253 or 332 can serve as a basis for the Commission to address state or local regulations with respect to facilities deployment and competition within MTEs." We understand this question to pertain only to buildings owned by state and local governments and therefore not relevant to the Commission's authority over private property owners. Consequently, the Real Estate Associations have no view on this question.

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[72] *See* Part V.B.

E. The Closest Relevant Legal Standard Is the Definition of Effective Competition in Section 632 of the Communications Act.

Congress has never said anything about either the proper treatment of facilities used to deliver broadband Internet access service inside apartment buildings, or how many providers must be available to potential subscribers in a given environment. But Congress has established a standard on an analogous topic, which happens to offer useful and clear guidance on how to address the issue posed by the NPRM. Congress has defined "effective competition" for the purpose of determining whether rates for cable service in a given geographic area should be regulated.[73]

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[73] Section 632(l)(1), 47 U.S.C. § 543(l)(1) defines effective competition as follows:

(1)The term "effective competition" means that—
- (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
- (B) the franchise area is—
  - (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable to at least 50 percent of the households in the franchise area; and
  - (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributors exceeds 15 percent of the households in the franchise area;
- (C) a multichannel video programming distributors operated by the franchising authority that franchise area offers video programming to at least 50 percent of the households in that franchise area; or
- (D) a local exchange carrier or its affiliate (or any multichannel video programming distributors using the facilities of such carrier or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

The Commission's rules incorporate the same definition at 47 C.F.R. § 76.905.

To be clear, the Real Estate Associations are not arguing here that 47 U.S.C. § 543(l)(1) gives the Commission any authority to regulate the terms of any agreements between a building owner and a broadband provider. What we are saying is that Congress has not spoken to that issue, but in the one instance we have in which Congress has spoken to an analogous issue – whether there was sufficient competition to justify not regulating cable television rates – Congress concluded that two providers was a good standard. Furthermore, as it happens, there is ample evidence that most apartment owners have access to at least two providers, so in considering whether regulation is required (assuming the existence of some adequate authority) the Commission should bear the burden of showing why two providers is not enough.[74]

In essence, if there are two competing providers for video programming service in a community, Congress directed the Commission to allow those providers to compete free of any regulation of their rates. This standard has been achieved in essentially the entire United States, and consequently cable television rates have been effectively deregulated for a decade. In fact, the Commission formally lifted all rate regulation in 2015.[75]

Applying the same standard to broadband service in apartment buildings, even if not legally binding, would help direct this proceeding in a useful direction. As we have demonstrated, there is very good evidence that most apartment communities in the United States today are served by at least two broadband providers. Under the two-provider effective competition standard, there is no reason to regulate any aspect of the infrastructure available, or

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[74] Once again, the level of competition in the office market is generally higher than in the residential market, whether single or multifamily, because business subscribers pay more than residential ones. Still, the two-provider standard would equally logical in that context.

[75] *In re Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574 (2015).

the contracts between providers and property owners, in any situation in which the there are two providers serving a property. Regardless of the terms, there is competition in those buildings. Residents have a choice. Furthermore, as discussed in Part VI.E, even if one provider has exclusive marketing rights, residents know about the availability of service from competitors: they see the advertising in the general media market, they receive targeted advertisements from those providers and they talk to their neighbors. It is not hard for residents to learn about competitive choices in their apartment communities, and if the providers are willing and able to serve under those conditions – as they obviously are – there is simply no reason for government intervention.

Once again, to be clear, the Real Estate Associations are not proposing regulation along these lines. Nor do we believe that the effective competition standard we are advocating grants the Commission any authority. But, in principle, if we assume under a two-provider effective competition standard, that agreements in buildings with only one provider might be subject to regulation, what regulation might be appropriate? As we will see, even in the single provider scenario, regulation is not appropriate because of the many factors that may be responsible.

Three points matter here. First, because competition manifestly exists at many properties that are subject to exclusive wiring and exclusive marketing agreements, and in which providers are paying the owner a door fee or other compensation, there can be no presumption that those kinds of agreements are responsible for situations in which there is only one provider. The mere absence of competition is not a reason to regulate, without more.

Second, if there is only one wireline provider in the overall geographic market in which the apartment building, commercial or retail facility is located, it would be unreasonable to expect that the property be served by two providers. While competition is desirable and known

to happen in such circumstances, there should again be no presumption that the agreements between the owner and the one provider are responsible for the lack of competition if residents of the single-family community across the street also have only one choice. It is unreasonable to impose on individual private property owners any obligations if market forces entirely outside their control have not generated competition in the surrounding community.

Third, there is evidence that providers discriminate. That is to say, when owners contact providers about service in a building, providers sometimes refuse to serve, or will do so only if the owner pays the entire cost of the infrastructure needed to reach the property, as well as the facilities needed inside the building. While owners are often willing to subsidize network construction within their communities, it seems safe to say nobody would expect owners to pay for off-site construction. Nor is it clear that owners should be expected to pay for the cost of any facilities constructed inside their buildings for the use of broadband providers. But that is not the core issue here. The point is that we know that providers are often willing to serve properties even when there is already a competitor present, even when that competitor may have entered into an exclusive wiring or exclusive marketing agreement or both. So the question should not be, in those cases where there is only one provider, whether two-provider effective competition is not met because of the nature of the existing agreements the owner has entered into, but whether it is because of other factors, such as the providers' business plans.

For instance, we know that Starry, Inc. prefers not to serve buildings with fewer than 75 units.[76] This raises several questions. Is it reasonable for Starry to have such a standard? Perhaps it is. Similarly, is it reasonable for Starry to determine that it prefers not to serve buildings in which a competitor is subject to exclusivity? Again, perhaps it is. But if in both

[76] Comments of Starry, Inc., GN Docket No. 17-142 (filed July 24, 2017), at 5.

cases we know that competitors are willing to serve, whether in buildings with fewer than 75 units, or buildings with exclusivity in place, should we not leave it to the market to decide whether Starry is right or wrong? Even if Starry can claim that in a certain situation the presence of exclusivity made a difference in its decision, why should that subjective standard be the governing or regulatory standard? That was Starry's choice, based on its business plan, but other companies make different choices, based on different business plans.

In fairness, it is entirely reasonable for a provider to choose not to compete if it is unable to obtain access to existing wiring in a building, and believes that the cost of constructing its own facilities would make service unprofitable. But that is still not a reason to regulate wiring agreements. For one thing, as noted above in Part III, both the practical problems with managing and maintaining wiring and the current regulatory disparity encourage providers to enter into agreements that give them control over wiring, regardless of the effects on competition. But there are any number of other valid reasons that a provider may not wish to serve a property. If it is a small building, for instance, the investment needed to get service to the property may exceed the likely return in a reasonable time.

In summary, if there are two providers in a building, on what basis is regulation justified? None that the *NPRM* has articulated. And even if there is only one provider in the building, given the multiple factors at work, on what basis is regulation justified? Again, the answer is none.

V. THE NPRM'S EMPHASIS ON THE REGULATION OF ACCESS TO MULTI-TENANT ENVIRONMENTS TO BENEFIT NEW COMPETITORS IS MISPLACED BECAUSE THE CURRENT FREE MARKET HAS BEEN WORKING WELL FOR OVER A DECADE.

The answers to the fundamental questions posed by the *NPRM* are quantifiable, if the questions are posed properly.[77] For example, in responding to the first Commission proceeding to address exclusive agreements in apartments in 2007, the Real Access Alliance noted that regulation was unnecessary because fewer than half of apartment buildings were then subject to any form of exclusivity;[78] this included exclusive access, exclusive use of wiring, and exclusive marketing. That estimate was based on a survey of a relatively small sample of owners and was admittedly rough, but it was clear at the time that there were many properties available for competitors to serve, even with the existence of exclusive access agreements. The Real Access Alliance also reported that there were over 500,000 apartment buildings in the country at the time, with more being built every year, so there was ample room in the market for competitors to expand.

Today, the Real Estate Associations believe that there may well be fewer exclusive agreements of the kinds that were at issue in 2007 and 2008, if only because exclusive access

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[77] As stated in n. 3, *supra*, this discussion pertains largely to the apartment industry. Exclusive marketing agreements do not exist in the commercial context. Exclusive wiring agreements, as the term is used in the *NPRM*, also do not exist, although in fact most providers own the facilities used to serve their tenants from the minimum point of entry to the building to the tenant's premises and those facilities are not shared with any other provider. Similarly, although providers may pay a negotiated license fee for the right to occupy space and serve the building, door fees and revenue share fees as described in the *NPRM* do not exist in the commercial market.

[78] Real Access Alliance Comments, MB Docket 07-51 (filed July 2, 2007) at 12.

agreements have been banned.[79] Nevertheless, as we discuss in Part V.A below, the Commission's disparate treatment of fiber facilities owned by LECs has encouraged the growth of a different type of exclusive wiring agreement, in which the provider retains ownership of the equivalent of the cable home run wiring throughout a property. Furthermore, the amounts providers are willing to pay under marketing or wiring exclusivity arrangements have declined, despite the increased cost of property development overall.[80]

The reality is that regulation is only being considered because a handful of providers claim that they have trouble competing in the current market. In fact, the comments in response to the *NOI* that were cited in the *NPRM* in support of potential regulation amount to mere unsupported accusations, by a minority of commenters. Such anecdotal claims should never be taken at face value. Not only is America a very large country, in which a single anecdote reveals little about reality, but even such anecdotes are questionable if all of the facts about a given situation are not known. This is why our judicial system allows parties to defend themselves by telling their own side of the story and cross-examining their accusers. Furthermore, such loaded terms as "kickback" and "payola" should never appear in formal communications to an agency without evidence, yet that is exactly what has happened in this instance.[81] Not only does such

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[79] Because many owners prefer nonexclusive marketing arrangements, there may be fewer exclusive marketing agreements overall. It is difficult to assess the proportion of exclusive wiring agreements, but because the LECs obtain exclusive rights in their agreements, this proportion may not have changed.

[80] K. Smith Decl. at ¶15; Yeh Decl. at ¶14; A. Smith Decl. at ¶19; Knutsen Decl. at ¶17; Austin Decl. at ¶15.

[81] The key paragraphs of the NPRM in which proposals for regulation are cited, referring to the record in response to the NOI are ¶¶ 18, 21, 22, 23, and 25. Setting aside commenters who address access to rooftops and DAS's, the calls for regulation of exclusive wiring, exclusive marketing, and revenue sharing constitute a total of seven commenters (CalTel, FastMesh, Fiber Broadband Association, INCOMPAS, New America's Open Technology Institute, *et al.*, Public

inflammatory language warp the debate by injecting emotion and bias into what should be a sober, evidence-based analysis, but in this case it is a clearly unfair attack on an entire industry.

The Real Estate Associations urge the Commission to base its decision on a full understanding of the entire range of issues and factors that address access to buildings and these comments attempt to provide much-needed background and context. Property owners and broadband providers enter into a range of different types of commercial contracts in order to meet their mutual needs. They do this within an environment that has been shaped in part by Commission rules, but is still primarily governed by the same kinds of business pressures and economic forces that power our entire free market economy. The Real Estate Associations urge the Commission to set aside preconceptions and special pleading, and to consider the facts and issues presented within that free market business context.

The Real Estate Associations thus believe that calls for regulation should be tested against the reality of the marketplace: If, for example, it were to be shown that competition is rare (by some reasonable measure) in properties subject to exclusive marketing agreements, such calls might have merit. On the other hand, if there are large numbers of properties served by multiple providers in which one provider has an exclusive marketing agreement, as we will show in Part V.B, then no regulation (even a transparency requirement) is warranted.

Our own estimates of these numbers are admittedly rough, as they were in 2007 and 2008, but the Commission has the ability to address this, simply by asking providers to submit the relevant data. The Commission's broadband competition reports have never asked for information about penetrations or speeds inside apartment buildings, but if the matter is worthy

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Knowledge, and Starry, Inc.). Of these, all but Cal Tel, FBA and Starry use the term "kickback" or "payola."

of regulation, and the Commission has the authority to regulate, then it would seem that any such regulation ought to be based on actual data, rather than anecdotal evidence.[82]

The Real Estate Associations therefore respectfully urge the Commission to obtain concrete information about actual conditions in the MTE environment by requiring broadband providers to submit the necessary information, along the lines of that provided in these comments. Such a report would presumably be much more comprehensive and accurate, because the Commission is better placed to gather the information from the relatively concentrated broadband industry than any entity seeking to obtain the same data from the real estate industry could be. The broadband industry is much more concentrated in a relative handful of companies, while the apartment industry in fragmented into thousands of firms of various sizes.

In any event, if as we believe and argue here, there is strong evidence of vibrant competition for the delivery of broadband service in apartment communities, notwithstanding the use of exclusive wiring and marketing agreements, any harm alleged by competitive providers needs to be evaluated in that context. Simply because a company can claim anecdotally that it was unable to serve a particular property on its preferred terms does not mean that there is a problem in the market. It just means that the company needs to work cooperatively with the property owner and reach a negotiated agreement.

[82] For more on this point, *see* Part II.C.

A. Exclusive Use of Wiring, Exclusive Marketing, and Other Current Contractual Mechanisms Are Rational Responses to the Economic and Regulatory Environment.

The market was very different when the Commission adopted the 2007 and 2010 *Exclusive Contracts Orders.*[83] Most video programming and broadband services in apartment communities were delivered by cable MSOs, with significant competition from PCOs. For an apartment community to be served by two wireline providers was relatively rare, although companies such as RCN were strong competitors in a few markets. The nature, structure, and purpose of contracts reflected the structure of that market, as discussed in the comments of the Real Access Alliance at the time.[84]

The rise of competition from the LEC broadband networks, however, has changed the market entirely. Today, competition inside buildings is common, and the nature, structure and purpose of contracts between apartment owners and broadband providers – although in many ways similar to that of a decade ago – has evolved accordingly.

The terms and conditions of agreements with providers have always depended primarily on the needs and policies of the providers. Owners are not in a position to demand that any particular provider serve any specific apartment community. In fact, because the providers know that it is essential for owners to be able to offer residents access to broadband services, they have considerable bargaining power. Consequently, as the needs of providers have changed over the past decade, so have the terms of their contracts with apartment owners.

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[83] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Second Report and Order 22 FCC Rcd 20235 (2007); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Second Report and Order, 25 FCC Rcd 2460 (2010).

[84] Real Access Alliance Comments, MB Docket 07-51 (filed July 2, 2007) at 7-15.

Furthermore, because residents demand competitive choices, new providers can and do compete in this framework. The *NPRM* cites examples of competitors who say that they are able to compete in the current environment.[85] This alone is very strong evidence that the market is working: some competitors are satisfied, others are not; that is not a sign of dysfunction, but a suggestion that some competitors need to adjust their business strategies.

Because the terms of service agreements vary based on the policies and needs of providers, the *NPRM*'s focus on exclusive use of wiring or exclusive marketing is not entirely accurate. Agreements today fall into three broad groups: (i) contracts between owners of smaller or less profitable buildings and providers (principally the cable MSOs and LECs), which are essentially not negotiated and typically provide for no compensation or exclusivity; (ii) somewhat more sophisticated agreements that may involve any combination of wiring exclusivity, marketing exclusivity and compensation but little more; and (iii) highly complex contracts that address a much broader range of issues. Commonly used terms for this third class of agreement are access agreement, license agreement, service contract, or right of entry agreement. Whatever the title, the three main functions of these contracts are to spell out the terms and conditions of: (i) the service provider's access to the property for the installation and ongoing operation of the provider's infrastructure; (ii) the provider's use of infrastructure that is the property of the owner; and (iii) the provider's deployment and ongoing provisioning of certain services to the property.[86] In addition to such standard terms as the length of the agreement and other general contract provisions, these service contracts typically cover, at a minimum, the following important areas:[87]

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[85] *NPRM* at ¶ 17.

[86] Hubacher Decl. at ¶14.

[87] Hubacher Decl. at ¶15.

- Access rights of providers (typically a license or recordable easement);
- Installation obligations of each party;
- Deployment dates (when will the provider's service be available to residents);
- Maintenance obligations (who is responsible for repairing worn out or damaged infrastructure);
- Service definitions and speeds (what services and speeds will be available);
- Service level agreements (what are the provider's responsibilities to perform resident installations and respond to outages and residents' service requests);
- Consideration to the property owner;
- Marketing rights (included in some but not all contracts);
- Remedies for damage to the property caused by the service provider; and
- Indemnity and insurance, which can be very complex, depending on existing coverage terms and lender requirements.

Nevertheless, in order to address the concerns raised in the *NPRM* regarding the categories of exclusive wiring, exclusive marketing, and "revenue sharing," the discussion that follows addresses only those categories.

1. Agreements for Service to Existing Apartment Buildings.

In the case of service from the local cable MSO to an existing property, owners typically enter into agreements in which the owner grants the cable MSO the right to use the existing cable home run wiring on an exclusive basis.[88] This wiring is typically coaxial cable, but sometimes it is fiber optic cable. As discussed in Part III.D, it is very rare today for a cable MSO to own the wiring inside an existing property.[89] Instead, the MSO will contract with the property owner to

[88] A. Smith Decl. at ¶13; K. Smith Decl. at ¶11; Yeh Decl. at ¶10; Austin Decl. at ¶10; Knutsen Decl. at ¶12.

[89] J. MacNaughton, *How to Make an Incumbent Cable Operator Share All its Wire with an Overbuilder*, BROADBAND PROPERTIES (Jan. 2001), *available at* http://www.broadbandproperties.com/2001%20issues/Jan_2001_Features/How%20to%20Make%20an%20Incumbent%20.htm; *see also* K. Smith Decl. at ¶11; Knutsen Decl. at ¶12; Austin Decl. at ¶10; Yeh Decl. at ¶12; A. Smith Decl. at ¶13.

use home run wiring that is the property of the owner on an exclusive basis. In exchange for such exclusivity, the cable MSO will agree in the contract to be responsible for all maintenance and repair of the home-run wiring. This makes practical business sense because the MSOs have skilled and trained technicians who are far more qualified and competent to maintain and repair broadband wiring than the owner's maintenance personnel.[90] This arrangement also benefits residents, because they will experience fewer service issues related to faulty wiring than they do when no one party has clear repair and maintenance obligations.[91] The terms and conditions of a cable MSO's use of such home-run wiring factor into the financial consideration paid to the owner. One component of this compensation typically takes the form of a "door fee," which is a one-time payment equal to a negotiated amount for each apartment unit.[92] Door fees can range from roughly $ 0 to $ 250.[93]

On the other hand, Verizon and AT&T, the two largest national telecommunications companies that offer fiber-based broadband service, routinely insist on installing and retaining title to their own fiber home run wiring.[94] In other words, they own all the fiber in a building from the minimum point of entry of the building, up to each apartment unit. By owning the internal fiber home-run they retain control over it and prevent its use by others. In principle,

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[90] *See,* K. Smith Decl. at ¶11; A. Smith Decl. at ¶13; Yeh Decl. at ¶10; Knutsen Decl. at ¶12; Austin Decl. at ¶10.

[91] *See,* K. Smith Decl. at ¶11; A. Smith Decl. at ¶13; Yeh Decl. at ¶10; Austin Decl. at ¶10; Knutsen Decl. at ¶12.

[92] *See,* K. Smith Decl. at ¶11; A. Smith Decl. at ¶13; Yeh Decl. at ¶10; Knutsen Decl. at ¶12; Austin Decl. at ¶10.

[93] *See, e.g.,* K. Smith Decl. at ¶11; A. Smith Decl. at ¶13; Yeh Decl. at ¶10; Knutsen Decl. at ¶12; Austin Decl. at ¶10; Sadler/Pye Decl. at ¶14.

[94] *See,* K. Smith Decl. at ¶13; A. Smith Decl. at ¶16; Yeh Decl. at ¶¶12,18; Knutsen Decl. at ¶14; Austin Decl. at ¶¶12,19; Sadler/Pye Decl. at ¶15.

owners could reject this approach in negotiations, but this is not a point the providers are willing to negotiate.[95] Once these carriers have installed the fiber to the units, they connect their fiber to a wiring panel installed by the owner, which interconnects with the wiring inside the unit.[96] These providers do not enter into exclusive wiring agreements, because they are not using any of the owner's wiring to get to the units. As a practical matter, however, their policies result in de-facto exclusive wiring arrangements and put them in the same position as the cable MSOs: both sets of companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each unit.

CFB providers also typically will install their own fiber from the minimum point of entry to each unit or to an intermediary utility closet ("IDF").[97] The CFB providers cannot use LEC-owned fiber because it is owned by each carrier and the owner has no rights to let the CFB provider use that fiber. When a CFB provider installs fiber to each unit, there is no need for the CFB provider to connect to any owner-owned wiring except for the wiring inside the unit. However, when the CFB provider extends its fiber only to the IDF, there must be some owner-owned wiring available for the CFB provider to run its signals from the IDFs to the units. Often CFB providers can use Category 6 or Category 5(e) wiring to carry their signals to the units if such wiring exists at the property. In principle, an owner may have no objection to allowing such providers to use the owner's wiring, but in practice that wiring just may not exist. If the

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[95] *See,* K. Smith Decl. at ¶13; A. Smith Decl. at ¶16; Yeh Decl. at ¶12; Austin Decl. at ¶19; Knutsen Decl. at ¶21.

[96] K. Smith Decl. at ¶13; A. Smith Decl. at ¶16; Yeh Decl. at ¶12; Austin Decl. at ¶12; Knutsen Decl. at ¶14.

[97] *See,* K. Smith Decl. at ¶14; A. Smith Decl. at ¶17; Yeh Decl. at ¶13; Austin Decl. at ¶13; Knutsen Decl. at ¶15; Sadler/Pye at ¶16.

cable MSO uses coaxial cable to deliver its services to the units, there simply may not be any wiring available for the CFB provider.

Many of the CFB providers prefer to install and own their own home run fiber all the way to the units for the same reasons as the LECs.[98] It is very difficult for any provider to deliver reliable service over a network if other entities have the right to disconnect and use the home run wiring on a unit-by-unit basis.[99]

2. Agreements for Installing Service in New Apartment Buildings.

Agreements for installing facilities in new buildings take the same basic forms described above, except that, because there is no existing wiring in the building, part of the negotiation between the property owner and the cable MSO will typically involve which party will bear the cost of providing and installing the home run wiring that will be used by the MSO.[100] If the owner assumes some or all of the cost, that cost is often offset in part by the compensation the MSO will pay under the service contract.[101] Regardless of which party actually provides and installs the home run wiring, title to that wiring will be held by the property owner.[102] With AT&T and Verizon, this negotiation does not occur as both companies routinely insist on

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[98] *See,* A. Smith Decl. at ¶18; Austin Decl. at ¶14; Knutsen Decl. at ¶16.

[99] *See,* Sadler/Pye Decl. at ¶17 ("Many of the competitive ISPs that Our Clients contract with prefer to install fiber to the unit's distribution panel for the same reasons as the telecommunications carriers. Understandably, it is challenging for any provider to deliver reliable service over a network if other entities have the right to disconnect and use the home run wiring on a unit-by-unit basis.")

[100] K. Smith Decl. at ¶19; A. Smith Decl. at ¶24; Hubacher Decl. at ¶16; Yeh Decl. at ¶18; Austin Decl. at ¶18; Knutsen Decl. at ¶21; Sadler/Pye Decl. at ¶21.

[101] A. Smith Decl. at ¶24; K. Smith Decl. at ¶19; Yeh Decl. at ¶18; Austin Decl. at ¶18; Knutsen Decl. at ¶21.

[102] A. Smith Decl. at ¶24; K. Smith Decl. at ¶19; Yeh Decl. at ¶18; Austin Decl. at ¶18; Knutsen Decl. at ¶21.

installing, owning and exercising exclusive control over their own fiber home run lines that extend to each unit.[103]

For the most part, providers prefer to use their own technicians or contractors for the installation of their facilities.[104] In new construction, owners often install microduct provided by the cable MSO, and the MSO will later install the wiring or fiber optic cable within the microduct.[105] On the other hand, Verizon and AT&T typically want to install both the microduct and the fiber that is housed within the microduct.[106] One reason owners sometimes prefer the cable MSO approach is that if the owner can control the timing of installation of the microduct, it will have fewer concerns that construction of the entire building may be delayed while the owner waits for the provider (like AT&T and Verizon) to do the work.[107]

3. Agreements for Installing Service in Office Buildings, Retail Real Estate and Other Commercial Properties.

Twenty years ago, the Commission examined competition in the office market in the *Competitive Networks* proceeding. The real estate industry introduced extensive information of how that market works, showing that property owners are responsive to tenant requests.[108] Other

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[103] A. Smith Decl. at ¶24; K. Smith Decl. at ¶19; Yeh Decl. at ¶18; Austin Decl. at ¶19; Knutsen Decl. at ¶21; Sadler/Pye Decl. at ¶21.

[104] A. Smith Decl. at ¶25; K. Smith Decl. at ¶20; Austin Decl. at ¶¶12,13,19; Knutsen Decl. at ¶22; Sadler/Pye Decl. at ¶22.

[105] A. Smith Decl. at ¶25; K. Smith Decl. at ¶20; Knutsen Decl. at ¶22; Sadler/Pye Decl. at ¶22.

[106] A. Smith Decl. at ¶25; K. Smith Decl. at ¶20; Yeh Decl. at ¶12; Knutsen Decl. at ¶22; Sadler/Pye Decl. at ¶22.

[107] *See*, Grimm Decl. at ¶13; K. Smith Decl. at ¶20; A. Smith Decl. at ¶25; Knutsen Decl. at ¶22; Sadler/Pye Decl. at ¶22.

[108] Real Access Alliance Comments, WT Docket 99-217 and CC Docket 96-98 (filed Aug. 27, 1999), at 4-26; Real Access Alliance Further Comments, WT Docket 99-217, CC Docket 96-98, and CC Docket 88-57 (filed Jan. 22, 2001), at 2-34; and Real Access Alliance Further Reply

than banning exclusive access agreements, which simply did not exist in that market anyway, the Commission took no action. Nothing has changed. Commercial and retail property owners may adopt various strategies regarding the management of inside wiring, but they all serve the purpose of providing tenants with access to multiple providers. The agreements with providers are typically right-of-access or license agreements that grant the provider the right to install its facilities for the purpose of serving one or more tenants at the property. The owner may charge a modest license fee as well as an administrative fee designed to recover initial transaction costs. In the Washington, DC, market, the license fee generally will be a few hundred dollars a month, and the administrative fee will be something close to $2,500. These fees and other practices certainly vary across the county, but they are not tied to any form of exclusivity.

B. Information gathered by the Real Estate Associations from Apartment Owners and Industry Experts Demonstrates that Exclusive Wiring and Exclusive Marketing Agreements Do Not Hinder Competition for Broadband Service Inside Apartment Communities.

In preparing these comments, the Real Estate Associations have gathered information form a range of sources in the apartment industry, demonstrating that the concerns raised in the *NPRM* are not in fact problems. This information, which we will review in outline below, demonstrates emphatically that exclusive wiring and exclusive marketing agreements and the payment of compensation by providers to owners do not hinder competition for broadband service inside apartment communities. We can say this with confidence because (i) broadband competition is extremely common in apartment buildings; and (ii) it is extremely common for

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Comments, WT Docket 99-217, CC Docket 96-98, and CC Docket 88-57 (filed Feb. 21, 2001), at 7-18).

one or even two competitors at a property to have exclusivity rights of some kind and to be paying compensation of some kind.

Included are declarations from representatives of the following large, national apartment companies: AMLI, Continental, Equity Residential, Essex, and GID/Windsor. We may also submit similar information for the commercial and retail real estate industry with our reply comments.

Also attached are three declarations from four industry experts, Arthur S. Hubacher, managing member of Hubacher Ames & Taylor, PLLC; Andrew Smith, President of Ancillary Services Management; and Henry Pye and Steve Sadler, Vice President and Director Multifamily Development, respectively, of the SmartSource Resident Technology group of RealPage, Inc., jointly.

In addition, NMHC and NAA conducted a survey of their members, similar to one conducted in connection with the Commission's recent OTARD proceeding (the "*NMHC MTE Survey*"). The survey was of thirteen large, national companies.

The Declarations disclose two key points: (i) a large portion of each owners' portfolio, or the portfolio of properties that the industry experts are working with, is subject to some form of exclusivity; (ii) only about a third of properties are subject to exclusive marketing agreements; and (iii) a very large proportion of each portfolio – roughly 80% to 90% -- is served by at least two providers.

Here are two tables summarizing the latter two points:

Table 1: Percentage of Portfolio Subject to Exclusive or Nonexclusive Marketing

Type of agreement	Equity Residential	Essex	GID/Windsor	Hubacher	Pye/Sadler
Exclusive Marketing	29%	13%	35%	25%	33%
Non-Exclusive Marketing	68%	87%	65%	75%	67%

Table 2: Percentage of Portfolio Served by One, Two, or More than Two Broadband Providers

No. of providers	ASM	Equity Residential	Essex	GID/Windsor	Hubacher	Pye/Sadler
1	3%	6.5%	39%	2%	15%	16%
2	81%	86.5%	54%	83%	63%	75%
2+	15%	7%	7%	15%	22%	9%

Notes:

1. ASM figures are for client agreements negotiated since January 1, 2017.
2. GID figures include properties served by DSL.
3. Hubacher figures are for client agreements for new construction, 2018 to present.
4. Pye/Sadler figures are for client agreements for new construction, 2016 to present.

The Real Estate Associations believe these tables fairly reflect the state of the market. The *NMHC MTE Survey* mentioned above found that an average of 76% of properties in the sample offer more than one provider, only slightly lower than the 80-90% range in Table 2. This compares very favorably to the 44% of the entire U.S. population that has access to two wireline broadband providers (*see* Part II.B). The range of 7% to 25% for properties with more than two providers is comparable to the national number of 14%.

We did not prepare a table with figures for exclusive wiring agreements because the information provided in the declarations proved to be inconsistently gathered and presented. The *NMHC MTE Survey*, however found that, on average, two-thirds (66%) of properties with cash compensation agreements in place have more than one broadband provider on site. This would include marketing as well as wiring agreements.

While the Real Estate Associations acknowledge that the data is not complete, it does represent a broad range of geography and property types and provides a representative snapshot of the market. Furthermore, all of the declarations were made subject to penalty of perjury: they are not anecdotes or allegations or one-off examples. If this information is not convincing, for whatever reason, we urge the Commission, for all the reasons stated in Part II, to take steps to gather all of the relevant data from the providers subject to its jurisdiction.

In any event, the Real Estate Associations are confident that such a data-gathering exercise would confirm these three essential facts: (1) there is a great deal of competition inside apartment buildings; (2) on average, apartment residents are more likely to have access to a wireline competitor than are Americans who do not live in apartments; and (3) the payment of compensation to owners has not hindered this competition. These facts alone warrant the swift termination of this proceeding without further action by the Commission.

VI. THE ONLY COMMISSION REGULATION THAT IS NEEDED IS THE EXISTING BAN ON EXCLUSIVE ACCESS AGREEMENTS: MARKET FORCES ARE PROMOTING DEPLOYMENT AND COMPETITION INSIDE BUILDINGS OF ALL KINDS.

The evidence laid out in Parts I and V is clear. Competition inside buildings is widespread, and it exists because owners are meeting the needs of their residents. The market works, and no further regulation is needed. The fact that some providers object to how the market works is irrelevant: other companies are delivering broadband service in apartment buildings on a sustainable, profitable basis. There is simply no reason for the Commission or any other government entity to intervene.

A. Banning Exclusive Access Agreements Accelerated the Growth of Competition Inside Buildings.

When the Commission first proposed to ban exclusive access agreements in 2007, the participating real estate trade associations were opposed. The real estate industry believed then that Commission regulation was unnecessary and that the market could handle the concerns that were being expressed. The Real Estate Associations still believe that was true then, and that it remains true today. Although the ban on exclusive access agreements undoubtedly helped Verizon and AT&T roll out their video and broadband products, there is no reason to believe that over time property owners would not have begun insisting on nonexclusive agreements when negotiating with the cable MSO's, because residents would have been demanding competition. If the LEC video and broadband products had not been desirable, things might have been different, but the reason that property owners today work to ensure that there is competition in their buildings is simply that the LECs had good products that stimulated demand for competition. After all, the ban on exclusive access did not mandate access, or grant competitive providers any new rights. Owners retained and still have the right to allow only one provider to

serve their properties. So the primary reason that there is so much competition inside apartment buildings today must be that owners see a benefit in allowing multiple providers to enter and serve.

When the Commission decided to adopt the ban, it also expressly permitted exclusive wiring and exclusive marketing agreements to remain as options in the market for all the reasons stated at the time, and restated in the current *NPRM*. Nothing has changed today, in the sense that, as we have always argued, resident demand drives the market.

B. Truly Exclusive Rooftop Access Agreements Are Rare And There Are Sound Management Reasons for Building Owners To Maintain Full Authority Over Their Rooftop Space.

It is very rare for any owner to grant a communications provider or any other type of entity the exclusive right to use the roof of a building. Damage to a rooftop can result in catastrophic damage to the rest of the property, so owners are very careful about granting access. Furthermore, rooftop space is clearly valuable. An owner may have grant a wireless carrier the exclusive right to use a portion of a rooftop for its equipment, but it is not in the owner's interest to grant a single entity the exclusive right to an entire rooftop, simply because it forecloses the possibility of earning additional revenue from another lessee. In some cases, an owner may allow a DBS provider to install equipment on a rooftop, but again, this would not be on an entirely exclusive basis.

The one exception to this would be when an owner has entered into an agreement with a wireless infrastructure manager, such as American Tower or Crown Castle. Such agreements may grant the infrastructure manager the exclusive right to use all of the space on the roof of a building. This is done under the assumption, however, that the lessee will sublease space to multiple carriers and pay the property owner increased rent on that basis.

In addition, rooftop antenna systems generally do not serve building tenants. To the extent that the purpose of the *NPRM* is to expedite broadband deployment inside MTEs, a discussion of rooftops seems out of place.

It is not clear why this is an issue worthy of examination; the Real Estate Associations are unaware of any problems in this area.

C. Satellite-Based Private Cable Operators Retain the Right to Enter Into Exclusive Agreements, but This Has Impeded Neither Broadband Infrastructure Deployment nor the Growth of New Providers.

When the Commission decided to bar multichannel video programming providers from entering into exclusive access agreements, it excluded satellite-based PCOs,[109] which can only provide competitive broadband service by bringing in a separate terrestrial connection. Consequently, for more than a decade, agreements between PCOs and property owners have been unregulated and providers have been free to pay owners for exclusive access to apartment residents. And yet, apartment owners routinely enter into agreements with cable MSOs and other providers of both video and broadband products. In fact, direct broadcast satellite providers ("DBS") of all types only make up 33.5% of the video market today, nearly the exact share they had in 2010 (33.1%), two years after the Commission banned exclusive access agreements.[110] This experience is certainly strong evidence that property owners take into account considerations other than revenue when entering into agreements with service providers.

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[109] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20251 (2007).

[110] *2018 Consolidated Market Report* at ¶54, Fig. B-2; *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, MB Docket No. 07-269, 27 FCC Rcd 8610, 8668 (2012) ("*14th Video Competition Report*").

Furthermore, throughout the same period apartment owners have continued to invest their own capital in various types of broadband infrastructure to assist wireline and wireless providers in deploying their services. They did this because the cable MSOs and the local exchange carriers offered products that residents said they wanted and preferred. If the new competitive providers have a better product, there is no reason to believe that apartment owners will not respond in the same way. Various parties can make theoretical arguments about owner incentives, or claim mistreatment based on one-off, unverified situations, but the actual record shows that even though exclusive access agreements remain valid, the one sector that can still offer them has not grown over time.

D. Exclusive Wiring Agreements Are Essential To the Effective Management and Use of Facilities By Providers.

We have already explained why the cable MSOs negotiate for exclusive rights to use wiring and how the LECs are able to reach the same result by retaining ownership of wiring they install. Setting aside the historical reasons for that development, both forms of exclusive wiring agreement offer important practical benefits, the first being that the entity that is using the wiring has a clear incentive and obligation to maintain it. Shared resources tend not to be maintained properly; this phenomenon is well-known in economics as "the tragedy of the commons."

As the *Article 52 Declaratory Ruling* recognizes,[111] sharing of wiring in any form merely creates conflicts between providers, management problems for both owners and providers, and disincentives to further deployment.[112] The Commission already has a wiring sharing mechanism in place, in the form of the Part 76 rules, and it simply has not worked; this is not

[111] *Article 52 Declaratory Ruling* at ¶¶ 58-63.

[112] *See*, Pye/Sadler Decl. at ¶¶ 29, 30.

really a controversial or debatable statement. In fact, the failure of the Part 76 rules may the best argument against any action in this docket. As attractive as it may be to new competitors who are trying to reduce their construction costs, sharing of wiring is not a practical solution.

Furthermore, the current regulatory structure is unbalanced, because, as we discussed in Part II, the LECs are not required to share their facilities under any circumstances. This is a fundamental point that the *NPRM* and the *Article 52 Declaratory Ruling* never consider: Unless the Commission is willing to preempt every contract that gives Verizon or AT&T the right to install and use their own fiber facilities, no form of wire sharing is fair or feasible.

E. Exclusive Marketing Agreements Are Not Anticompetitive and Need Not be Regulated.

Owners generally enter into marketing agreements with all types of providers. They are not required as a condition of granting access to a property. In a typical marketing agreement, the owner agrees to provide some basic assistance with marketing the provider's service for which the provider will typically pay compensation in the form of a percentage of the provider's recurring revenue from its subscribers at the building. The percentage of revenue shared increases as the provider's penetration rate increases. In theory, revenue share in the contract can range from zero to 8 or 10%, depending on the provider's penetration in the building; in reality, however, the amount actually paid to the owner typically falls in the range of three to six percent, because the higher penetrations required for the provider to pay the higher percentages are not reached.[113] The amount of compensation providers have been willing to pay has gone down over time[114], and although the amount of the revenue share is negotiable, the maximum

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[113] A. Smith Decl. at ¶19; K. Smith Decl. at ¶15; Yeh Decl. at ¶14; Austin Decl. at ¶15; Knutsen Decl. at ¶17; Sadler/Pye Decl. at ¶18.

[114] Austin Decl. at ¶15; Knutsen Decl. at ¶17; K. Smith Decl. at ¶15; Sadler/Pye Decl. at ¶18.

amount they will pay depends largely on their internal policies, rather than on an owner's negotiation demands.

Notwithstanding the availability of greater compensation under exclusive marketing agreements, owners may seek to enter non-exclusive marketing arrangements with multiple providers at a single property whenever possible.[115] This is simply because the owner wants to make a choice of broadband providers available to residents and wants on-site staff to be able to market each provider's services so that residents can choose a service from the provider of their choice that meets their needs and budgets. Even though the financial offers from service providers are far less rewarding for a non-exclusive marketing agreement than exclusive marketing offers, these owners have chosen to place a higher priority on letting residents know that there is a choice of broadband providers available.

Residents are very much aware of which entities are offering services in the community at large because they are exposed to many forms of advertising and marketing in all forms of media. While exclusive marketing agreements grant certain rights to the respective providers, they do not prohibit on-site staff from answering questions from residents about the availability of other services. Consequently, it is not difficult for residents to learn whether there is a competitive alternative in their building.

Notwithstanding allegations made by some commenters in response to the *NOI*, on-site staff is aware of the differences between exclusive access agreements and exclusive marketing agreements, and they know which providers are permitted to serve their properties. On-site property managers, however, do not have the authority to grant or deny access to providers or

[115] Hubacher Decl. at ¶8; A. Smith Decl. at ¶20; K. Smith Decl. at ¶16; Yeh Decl. at ¶15; Austin Decl. at ¶16; Knutsen Decl. at ¶18; Sadler/Pye at ¶19.

enter into agreements with providers. Nevertheless, it is common for provider representatives to contact property managers and attempt to gain access or make claims of various kinds regarding the rights of the provider. Such communications should be made to the appropriate owner representatives, yet providers continue to rely on untrained personnel who contact the wrong people and are then surprised when they fail to get satisfactory answers.

F. So-Called Lease-Buyback Agreements Are Not A Significant Factor in the Marketplace Today.

So-called "sale and leaseback" agreements are very rare. Most of the national cable operators assume that the property owner owns all of the existing wiring inside an apartment building, for legal and practical reasons. Thus, most contracts with MSOs contain no "sale and leaseback" provision at all. The contracts just state with clarity that the owner owns the inside wiring but there is no language in the contract that "sells" the wiring to the owner. In older buildings, it is often impossible to determine who paid for or holds title to wiring that was installed many years in the past. Without documentation, the law in most states considers existing wiring to be a fixture and thus the property of the building owner. Furthermore, the FCC's inside wiring rules require cable operators to take certain steps to preserve any ownership interests they may have in inside wring and in practice this is rarely done. Consequently, "sale-and-leaseback" agreements are really not a factor in market.

G. The Policy Concerns that Once Justified Mandatory Access Laws Are Now Out-of-Date.

The first mandatory access state statute was adopted in Pennsylvania in 1951. No new state statutes have been enacted since 1999, however.[116] Under these statutes, certain providers have the right to obtain access to properties, provided that they follow certain procedures and construct the necessary wiring and other facilities. In the early days of the cable industry, these statutes were believed to be necessary to overcome the reluctance of property owners to allow construction of potentially disruptive facilities on their properties. Perhaps the statutes were necessary, in an era when cable was new and Americans of all kinds of housing were still accustomed to receiving television programming over-the-air. But today, the situation is entirely different. There is no over-the-air broadband analog to broadcast television. Owners need no incentive, other than resident demand, to allow broadband providers access to their buildings. Consequently, mandatory access statutes for broadband service are unnecessary, and to the extent that existing statutes apply to broadband providers of any type they are outdated.

Furthermore, the utility of mandatory access statutes is belied by the fact that roughly two-thirds of the states have not adopted them. This fact and common sense are enough to show that the laws are not needed to encourage access. The truth is that mandatory access statutes merely

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[116] Although Texas is sometimes listed as a mandatory access state, in fact, the 1997 statute in question is not commonly used or understood to grant mandatory access rights to video or broadband providers in residential properties. For an analysis of the weaknesses of the Texas statute, *see* Real Access Alliance Further Reply Comments, WT Docket 99-217, CC Docket 96-98, and CC Docket 88-57 (filed Feb. 21, 2001) at 44-47. In addition, the Commission's *Mandatory Access Report* refers to a 2010 Ohio law, but gives no citation. It is our understanding that Ohio does not have a typical mandatory access statute; instead, cable operators have been granted access rights under an old telecommunications statute, by court decision. *Media One v. Manor Park Apts., Ltd.*, 2000 Ohio App. LEXIS 4791 (Ohio Ct. App. 2000).

give certain categories of providers an advantage over the owners of properties they happen to want to serve—often higher-end properties with residents or commercial tenants who are more likely to pay for more expensive services. It is important to note that mandatory access ordinances are often adopted, in part, to address underserved residents and bridge the digital divide, yet in reality do nothing to encourage broadband access in underserved areas including in low-income or mixed-income communities. These ordinances simply serve as a pathway for some internet providers to further carve up the high-end of the housing and real estate market which provides them the greatest revenue opportunity while not deploying these same efforts in affordable or smaller properties or low-income neighborhoods that don't promise the same economic return.

Even further, mandatory access statutes attempt to override private property rights and wrestle control of a property and its infrastructure away from a property owner who knows the property, its considerations and its limitations best. Despite this being a clear taking that is legally questionable, these ordinances can have unintended consequences that policymakers may be unaware of when enacting. For example, the San Francisco mandatory access ordinance that the Commission pre-empted on a narrow basis via Declaratory Ruling required the sharing of any wire owned or controlled by the property owner, including those already in use, which carries with it a host of technical limitations and ultimately could deter broadband investment. Another example is in instances where real estate development takes place on environmentally sensitive land and requires the close monitoring and management of any infrastructure buildout and compliance. In situations like this, a property owner who is forced to grant access and build out rights to a provider who is unaware or not experienced in dealing with similar situations can lead to environmental or property damage that can cause long-term negative consequences.

The Commission's *Mandatory Access Report* suggests that there is a modestly higher broadband penetration rate in states with mandatory access statutes, when compared to other states. The *Report* should not be used as the basis for policymaking, however. The *Report* itself states that "[t]his effect is not necessarily a causal one; it only reflects a positive association existent in the data . . . ." In other words, the *Mandatory Access Report* does not state that mandatory access laws actually cause higher broadband penetration. There may be another factor that the study authors did not identify or isolate that is responsible for the apparent correlation.

NMHC has prepared an analysis of the *Mandatory Access Report*, which confirms that the relationship found by the *Mandatory Access Report* between mandatory access laws and non-MTE households "must stem from other compositional differences between states with and without mandatory access laws that were not explicitly controlled for in [the FCC's] model."[117] One such factor may well be population density: Of the 17 jurisdictions included in the FCC's Report, ten are in the top 13 in the nation in population density. Building broadband networks in densely populated areas is more efficient and cost-effective than it is in less densely populated areas, so it is not surprising that densely populated states, with or without mandatory access laws, would have high broadband penetration rates, both within MTEs and outside them.

Furthermore, the difference in broadband penetration found by the study is small by any measure. And again, given that essentially every MTE in the non-mandatory access states is served by at least one broadband provider, it is impossible to attribute much significance to mandatory access in those states that do have statutes.

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[117] National Multifamily Housing Council, *Critique and Analysis of Mandatory Access Laws and Broadband Use in Residential Multi-Tenant Environments* (Aug. 2019), attached as Exhibit K.

VII. ALLOWING BUILDING OWNERS TO BE COMPENSATED FOR THE USE OF THEIR PROPERTY BY BROADBAND PROVIDERS PROMOTES DEPLOYMENT AND THE SOUND ECONOMIC USE OF RESOURCES AND SHOULD REMAIN UNREGULATED.

The NPRM explicitly asks, at ¶ 20, whether the Commission should "restrict or prohibit revenue sharing agreements." No such rule would be reasonable, especially in light of the extensive information provided in the comments regarding the large sums property owners invest directly in broadband facilities and more generally in the creation of markets for broadband providers.

There are six reasons that the Commission should not attempt to regulate the compensation broadband providers pay to property owners in connection with the terms of access to buildings.

1. Revenue Sharing Agreements Cause No Actual Harm. In Part V, the Real Estate Associations have demonstrated that broadband providers willingly agree to serve apartment buildings in which one or more other providers are serving residents under various forms of exclusivity and revenue sharing. In the commercial and retail real estate market, there is no exclusivity or true "revenue sharing," and there has been ample competition for many years. The current market is working and neither providers nor subscribers are being harmed.

2. The Revenue Owners Receive from Providers Is a Tiny Fraction of the Owner's Investment. Property owners know that they are in a symbiotic relationship with broadband providers. Both industry sectors need each other. The remarkable fact is not that some property owners seek some limited compensation from broadband providers, but that after investing tens or hundreds of millions of dollars in a property, the owner does not demand payment from every provider for the right of access. After all, it is private property, and the other individuals and entities that occupy the property typically pay rent. But they do not, because they know they

need to bring providers onto the property on reasonable terms, for their mutual benefit: Property owners who pay for broadband infrastructure must assume that they will never recover the bulk of that investment.

Ironically, if one provider is willing to pay an owner a door fee or revenue share, it may become easier for that owner to bring on a competitor later on without compensation, simply because the revenue from the first provider made the overall finances of the project more favorable.

3. The Revenue Owners Receive from Providers Is Ancillary, and the Owners Know Full Well that Their Core Business Is Meeting Resident and Tenant Demand. The ancillary revenue owners receive from providers is important because all revenues attributable to a building affect the profitability of the property and help offset the development costs. But at the same time, the revenue an owner earns from communications providers at any one of its properties is small compared to both the investment in the building and the income received from residents in rent. Furthermore, especially in the case of publicly-owned companies, owners have a fiduciary duty to their shareholders to negotiate reasonable compensation for the use of their property by third parties. Conversely, that same fiduciary obligation compels company management to ensure that their communities remain attractive places for residents to live. As noted earlier, this means that owners must work to ensure that residents and tenants can obtain high quality, reliable broadband service and have a choice of providers. There is therefore a balance between maximizing compensation from providers and making sure residents have a choice, and that balance is best achieved through free market negotiations. In addition, the providers have their own policies and incentives and simply will not agree to pay more than amounts that they set.

For these reasons, the revenue owners receive from providers is not enough to overcome the strong pressure from residents for competitive choices.

For example, the national median apartment rent is approximately $1010 a month[118] and the median cost of broadband service is roughly $50 a month.[119] Let us assume a property with 100 units, whose owner receives a typical door fee of $150 per unit.[120] In such a case, a typical agreement with a cable MSO would yield a one-time door fee of $15,000 for a five-year agreement, the equivalent of $3000 a year. The maximum revenue a single provider or combination of providers could earn from delivering broadband service to residents would be $60,000 a year, assuming every resident took the service. A 5% marketing fee would produce additional revenue of $3000. In other words, the property owner would earn approximately $6000 a year in fees from the broadband provider or providers.

To put this in perspective, consider that the maximum rent revenue the owner would receive at the same property is $1,212,000 per year. The rent revenue from a single unit would be $12,120, more than twice the total revenue from the broadband provider or providers for the entire property. Even if we double the broadband revenue to account for marketing fees on video service, the total is less than the rent from one unit. This illustrates that the fees owners receive from broadband providers are simply not large enough to create an incentive to deny

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[118] Source: NMHC tabulations of 2017 American Community Survey microdata. https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-apartment-rents/

[119] Equity Residential has provided a version of this analysis using actual figures from their portfolio. Austin Decl. at ¶¶ 23-24.

[120] Door fees range from $0 to $250 per unit. *See* Austin Decl. at ¶10; K. Smith Decl. at ¶11; Knutsen Decl. at ¶12.

entry to competitive providers. Losing a single resident per year over bad broadband service or a lack of choice is a much greater disincentive to an owner.

One can play with these numbers and push them one way or the other, but any fair, realistic scenario leads to the same conclusion: Owners are not foolish enough to let the revenue they receive from providers put their core business at risk. And in the rare case in which an owner might go astray, the market will address the issue more effectively than regulation ever could.

4. Preventing Payments to Property Owners Amounts to a Subsidy of the Broadband Industry. As described above, apartment owners invest enormous amounts of capital to promote the deployment of broadband infrastructure in two ways. First, every time a new apartment community, office building, retail property or other commercial real estate development opens, a new market for broadband services is created. The mere existence of those apartment units and commercial spaces, once they are populated with residents and tenants, benefits the broadband industry greatly. Without them, there would be less need for wireline broadband connections and therefore a smaller market for fixed broadband subscriptions. Furthermore, the per subscriber cost of serving an apartment community is in general lower than that of serving a single-family community. Thus, every dollar spent by the apartment industry to develop and construct a new apartment building benefits the broadband industry.

Second, building owners spend their own capital specifically on broadband infrastructure. Some owners deliberately install conduit and other equipment in their new buildings for the express purpose of bringing in multiple broadband competitors. This is a direct benefit and subsidy to the providers because it reduces their cost of serving the property. There are only two ways for an owner to recover any part of that expense: from broadband providers, through some

form of reimbursement or other payment, or from residents and tenants as part of their rent. Property owners do not profit from the installation of this infrastructure, except to the extent that over time the total revenue received by the owner in rent and other income must exceed the total cost of construction of the entire development. Furthermore, under no circumstances are the payments from broadband providers alone sufficient to cover the cost of the infrastructure they end up using.

Furthermore, the development of every new MTE is effectively a subsidy of the broadband industry, because serving dense developments can be done at lower deployment costs. For the Commission to ban revenue sharing, restrict recovery to costs, or regulate compensation in any way will merely increase that subsidy, or discourage owners from investing in facilities in the first place. Either the full cost will be borne by providers, or (far more likely) owners will become reluctant to upgrade wiring, construct new wiring to make available to multiple providers, or enter into discussions with competitive providers of any kind.

Consequently, the real estate industry is already subsidizing broadband deployment. For owners to recover a small part of that contribution is perfectly reasonable. For the Commission to ban or regulate compensation paid by providers to owners is a different matter entirely. Because such an action would amount to a subsidy, in which the real estate industry would be required to absorb costs imposed by the broadband industry by government fiat, it would violate Section 254 of the Communications Act. In that statute, Congress eliminated the old implicit subsidy scheme used to fund universal service. The Commission cannot now create an entirely new implicit subsidy out of whole cloth.

5. Regulation of this Type of Compensation Will Not Help New Competitors. The Real Estate Associations believe that the CFB providers that complain about revenue sharing actually

do not understand how the market works. To the extent that they do, their goal seems to be to promote some form of wire sharing, but banning revenue sharing agreements will not accomplish that goal. The only fair way to impose wire sharing is to either (i) force the LECs to make their wiring available using a new scheme comparable to the existing Part 76 rules, or (ii) to directly subject the LECs to those rules. We think this is unlikely to happen.

Furthermore, as discussed earlier, the Commission's *Sheetrock Order* means that Part 76 home run wiring is very limited in extent, and in most cases does not extend to the units. And the cable MSOs will still have no incentive to own wiring and they will still turn title to any new wiring they construct over to property owners. Is the Commission going to forbid providers from transferring title to assets?

Finally, whether under a complete or partial ban on compensation, basic economic principles suggest that any new regulation must have the effect of discouraging owner investment in facilities. From an economic perspective, this is a straightforward conclusion. If owners are unable to earn any compensation for investments in broadband infrastructure, they will spend less on that infrastructure. This benefits nobody.

6. The Commission Has No Authority to Regulate this Type of Agreement. Congress has never come close to saying that the Commission could regulate compensation of this sort. The authority underlying the Part 76 rules is a very thin reed and Section 201(b) presumably does not apply to practices related to broadband services. Furthermore, in the *Internet Freedom Order*[121] the Commission ended utility style regulation of the Internet and eliminated conduct rules on ISPs. Those regulations were more closely related to the actual services broadband

[121] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd 311, 318, 363, 375-377 (2018).

providers deliver than any regulation of compensation paid by a provider to a property owner. Conversely, regulating a provider's costs, such as whatever it pays for access to real estate, smacks very much of utility-style regulation. It is thus very hard to see how the Commission can justify any of the proposals in the NPRM for regulation of revenue sharing.

VIII. BUILDING OWNERS CONTRIBUTE TO THE DEPLOYMENT OF BROADBAND INFRASTRUCTURE THROUGH THE CONSTRUCTION OF DISTRIBUTED ANTENNA SYSTEMS AND OTHER IN-BUILDING FACILITIES.

Part I.D describes the investments of building owners make in DAS facilities, with no possibility of recovering any of the expense. Although in principle there are things the Commission could do that would relieve building owners of some of the expense and other burdens associated with providing high-quality wireless service inside apartment buildings, office buildings, retail properties and other commercial venues, the Real Estate Associations understand that the Commission may be reluctant to consider those options. We also believe that regulation of agreements between property owners and DAS contractors or carriers, as the case may be, are unnecessary.

A. Regulation of DAS Construction By Building Owners or of the Terms of Access to Facilities Constructed by or for Building Owners Would Be Counterproductive.

The only reason anybody installs a DAS or a comparable system inside an apartment community, office building, retail property or other real estate development is to satisfy resident, tenant and visitor demand for wireless service. Three parties benefit when a DAS is built: (i) those residents, tenants and visitors who subscribe to service from the carrier or carriers whose signals will be carried by the DAS, because the quality of their service improves; (ii) the property owner, because apartment residents, commercial and retail tenants can and will move out (or won't move in in the first place) if they are unhappy with their wireless service; and (iii)

the carrier or carriers whose signals will be carried by the DAS. In some scenarios, there may be a fourth party: an independent infrastructure provider that agrees to construct and manage the DAS for the benefit of the other three parties.

Of course, somebody has to pay for the DAS. The questions raised in the *NPRM* all ultimately turn on the economics of installing a DAS, so it is important to understand the incentives involved.

For a building owner, a DAS is purely a cost center, an undesirable but necessary expense. Property owners cannot charge for the services delivered by a DAS: all the revenue from the actual delivery of service to user of the DAS goes from the users to the carriers. The only revenue an owner can hope to receive is a partial reimbursement from a carrier for the cost of installation, but in reality owners bear the lion's share of all DAS construction, maintenance, and operating costs.

Ironically, the carriers are in a similar position, because construction of a DAS does not necessarily win them any new subscribers. At most, it helps retains subscribers who live or work in the building, and because most properties comprise only a few hundred units, that benefit is limited. For the mobile carriers, every dollar spent on DAS construction is a dollar that is not available for extending or improving infrastructure outside the building. Consequently, carriers today generally will not pay for the construction of DAS facilities. In the past, they might agree to pay a share of the cost of construction, with the owner paying the rest. Most commonly today, however, the carrier will only pay for the electronic equipment needed to connect a DAS to their exterior networks.

In other words, the economics of the situation are forcing owners to pay for the deployment of wireless broadband infrastructure, and they have no way to recover those costs.

In theory, an owner could increase the rent at a building to cover the investment in a DAS, but the real estate industry is highly competitive. A nearly identical building across the street may not have a wireless coverage problem, for any number of reasons. As long as some properties require DASs and others do not, owners cannot recover those costs. Furthermore, most apartment residents are highly sensitive to rental rates. They do not know or care whether there is a DAS at the property, or how much it cost the owner to install. They only care about the quality of their living experience, including wireless coverage, and how much they are paying for that experience. Tenants in office buildings, retail properties and other commercial venues, in which wireless coverage for employees, customers and visitors is essential, feel the same pressures.

In other words, in the vast majority of cases, it is more important to the owner than to the carrier to have a DAS on a property, which means that the owner pays most of the cost. This is just one way in which the real estate industry promotes the deployment of broadband technology.

The situation is further complicated by the following facts:

- A DAS is useless if a carrier refuses to connect the DAS to its network, because without a backhaul connection service at the property will not improve.
- It is unlawful for an owner to operate a DAS using licensed frequencies without the carrier's consent.
- While subscribers to one carrier may be receiving poor service at a property, other residents may be perfectly happy with their service. The immediate need – and often this is a very immediate need -- therefore will be for a facility to transmit the frequencies of the one carrier, rather than a neutral host facility. Without a reason to bear the additional expense of a neutral host facility, and no

prospect of recovering even the cost of a single carrier facility, the property owner has no reason to do more than is needed to solve the immediate problem. Furthermore, the one affected carrier has no incentive to share the expense of a neutral host DAS.

Some of the problems owners face regarding in-building wireless coverage can be addressed with the assistance of a third-party contractor. Such a contractor may be able to build and manage a neutral host system more cost-effectively than the property owner acting alone, which will be more efficient over the long term than addressing problems as they arise. Such arrangements are attractive because they can reduce the expense to the owner. Consequently, the Real Estate Associations urge the Commission to avoid any regulation of DASs that might make such arrangements more costly or otherwise less attractive to owners.

B. Building Owners Would Benefit from Commission Regulation Requiring Carriers to Cooperate in the Construction of DAS Facilities, But the Real Estate Associations Are Not Calling for Such Regulation.

There are many things that the Commission could do to ensure that every provider of wireless service had access to a network inside every building in the country. For example, the Commission could establish in-building wireless signal coverage and capacity standards that every wireless provider must meet, and then require any carrier that does not meet those standards to bear the full cost of constructing a DAS or take other steps to address the problem. One could imagine that apartment residents, commercial tenants or building owners would have the right to trigger such a deployment, so that if a single resident or tenant could show that he or she was not getting full value from a carrier, the carrier would have to pay the cost of constructing whatever facilities would be needed to meet the service standard.

Of course, the Commission has not imposed a universal service obligation on carriers to provide ubiquitous coverage, even on outdoor infrastructure. We have a market-based system that relies on competition to decide how to allocate resources, including capital for network infrastructure construction. Each of the four national carriers makes its own decisions about where and how and why to build infrastructure. Furthermore, competing technologies such as wi-fi calling can help meet the need at lower cost. A federal mandate aimed at assisting a particular sector of the communications industry is not the answer, at least not if we believe in the power of the market and the technology.

Just as it would be unreasonable and unwise to require carriers to expend scarce capital in ways that they consider unproductive or inefficient, it is unreasonable, unwise, and unfair to consider rules that would impose costs on or limit the options of building owners when the real estate industry is not only not the cause of the problem, but working actively to address it.

Any suggestion that property owners of any kind are in any way impeding wireless broadband deployment or interfering with competition is fundamentally erroneous. There are undoubtedly problems with delivering service of acceptable quality inside buildings, and those problems are very likely to grow. Those problems, however, arise entirely out of the nature of wireless technology, the physical characteristics of both radio frequency radiation and building materials, and the financial incentives of the carriers. Rather than propose the regulation of the real estate industry or of contracts to which property owners are parties, the Commission and the wireless industry should first acknowledge that property owners are in fact subsidizing the deployment of wireless broadband infrastructure and service, and then look at ways to work with the real estate industry to meet the common goal of ensuring that all Americans have access to high quality, high speed wireless broadband services in their homes and offices.

This is not to say that some property owners might not welcome regulations that require the wireless providers to cooperate more when a property owner has determined that a DAS is necessary. It can be very frustrating for an owner to deal with a carrier when their needs and interests are aligned differently. This is especially the case when the owner is spending a very large sum to make sure that the wireless carrier's customers have access to the carrier's own networks. But the Real Estate Associations feel strongly that this entire proceeding is inherently flawed; consequently, we merely urge the Commission to let the market work in this area, just as we do with respect to the inside wiring and marketing issues.

IX. TRANSPARENCY REQUIREMENTS WOULD BE UNREASONABLE, UNNECESSARY, CUMBERSOME AND INEFFECTIVE FOR THE INTENDED PURPOSE.

The NPRM raises the possibility of adopting transparency requirements regarding the disclosure of revenue sharing agreements (NPRM, ¶ 19); and disclosure of exclusive marketing arrangements (NPRM, ¶ 28).

Any such requirements would have to apply only to providers because the Commission has no power to regulate property owners in this context. More fundamentally, however, the Real Estate Associations oppose these proposals for the following reasons: (i) they are unnecessary, because the purported harm does not exist; (ii) the *NPRM* is vague, in that it offers no specific language that would allow commenters to fairly evaluate the content, extent, or likely effects of any disclosure; and (iii) poorly-designed disclosure requirements could discourage providers from entering otherwise lawful and useful agreements.

In paragraph 19, the *NPRM* suggests that disclosure requirements might "increase the likelihood that revenue sharing agreements benefit competition, deployment, and individual subscribers." For all the reasons addressed throughout these comments, disclosure would

advance none of those goals. Revenue sharing agreements do not hinder competition or deployment, and they do not harm subscribers. In fact, they help promote competition and deployment, and thereby help subscribers. Inasmuch as paragraph 19 presumes that revenue sharing is harmful, it epitomizes the flawed approach of the *NPRM*. There is no need to "increase the likelihood" of benefit; revenue sharing agreements already provide benefits and manifestly cause no harm.

Paragraph 19 also asks whether disclosure should be required of agreements that exceed "the actual costs of allowing service." This question suggests a lack of understanding of how revenue sharing agreements work. As discussed above, there are typically two types of compensation that might be paid to an owner. A true revenue share is normally associated with marketing services of some kind, either exclusive or nonexclusive. Thus, they are completely unrelated to costs and are simply a negotiated rate for the service provided. What costs does the *NPRM* have in mind? For instance, property managers meet with potential residents and therefore potential subscribers every day. Would the proposal be that the "cost" include a prorated amount of the property manager's salary, based on time spent with prospective or current residents who ask about broadband service?

Door fees, on other hand, may be associated with the installation of wiring: if the owner installs the wiring, the door fee will be higher than if the provider installs the wiring. There is no "cost of allowing service" here, either: the equation actually at work in these agreements concerns the cost the <u>provider</u> is willing to absorb, not the cost to the owner.

Very few commercial transactions are cost-based. That's not how free market economics works. Instead, willing buyers pay willing sellers what they think a good or service is worth to them at that moment. Attempting to turn agreements between property owners and broadband

providers into 1950's style regulated utility contracts is a step backwards. There is a reason the Commission no longer requires providers to file tariffs for their services.

In any event, owners never really recover the "actual costs of allowing service," whatever they might be, from broadband providers because if there is such a number, it must reflect the cost of constructing or acquiring the property: without the owner's investment in the building, there would be no subscribers for the provider to serve. Without the owner's investment in the entire building – which vastly exceeds any such "cost of allowing service" – the provider would not have an opportunity to provide service in the first place. Without the skill, effort, and financial capital of the apartment industry in creating and managing dense, cost-effective markets for providers to serve, fixed broadband providers would be substantially worse off. They would have fewer locations to serve and therefore fewer potential customers, or, if those customers were all living in single-family housing, the cost of service would be much higher. When viewed in their full economic context, the "building's actual costs of allowing service" far exceed the provider's cost of serving the building, much less the very modest amount the provider might be paying.

Thus, how would the Commission, or an owner, or a provider subject to a disclosure requirement calculate such an alleged cost? The real estate industry is essentially subsidizing the broadband industry, yet the *NPRM* suggests that the reverse is true. The proposal is unreasonable and unworkable.

Paragraph 28 is based on the false premise that there is "confusion about the impact of exclusive marketing arrangements." The only evidence of confusion is (i) Starry's claim that "the overly restrictive language and threatening tone" of these agreements is confusing to property owners; (ii) INCOMPAS's claim that such agreements have "the potential to create

confusion by the landlord" and (iii) the Fiber Broadband Association's repetition of both claims.[122] This isn't even evidence: it's speculation. In any case, it is difficult to see how disclosing marketing arrangements to consumers would eliminate any claimed confusion on the part of on-site management. A disclosure requirement of this sort would seem more likely to undercut the effectiveness of exclusivity and thus act as an end-run around the Commission's lack of authority over marketing arrangements.

In sum, disclosure requirements are not only unnecessary, but they would harm property owners. Providers would be less inclined to enter into them because of the additional costs and other burdens of compliance. They would offer little information of actual value to subscribers, and would instead create opportunities for complaints to owners from residents, for no good reason. The presumption that the owner profits from the revenue share is entirely unreasonable. The Commission might just as well as require service providers to itemize on their bills the amount of their annual profit allocable to each subscriber, or the share of dividends paid to shareholders, or the CEO's salary. All of those figures might be of interest to some subscribers; after all, if they were lower, the subscriber might pay less. In reality, they are no more relevant to the subscriber's rate than any other cost of providing service.

In principle, the Real Estate Associations believe in transparency and would be prepared to support logical disclosure requirements. Unfortunately, those proposed would disclose nothing of value and would undermine currently lawful and productive commercial arrangements.

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[122] Reply Comments of Fiber Broadband Association, GN Docket No. 17-142 (Aug. 22, 2017).

CONCLUSION

For all the foregoing reasons, the Commission should refrain from adopting any further regulation affecting broadband deployment in the MTE market. .

Respectfully submitted,

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August 30, 2019

EXHIBIT A

The Real Estate Associations

The Institute of Real Estate Management ("IREM"):

IREM® is an international force of nearly 20,000 individuals united to advance the profession of real estate management. Through training, professional development, and collaboration, IREM® supports our members and others in the industry through every stage of their career. Backed by the power that comes with being an affiliate of the National Association of REALTORS®, we add value to our members, who in turn add value to their teams, their workplaces, and the properties in their commercial and residential portfolios. Our memberships empower college students, young professionals, and industry veterans who are committed to career advancement. Earning our credentials, including the CPM®, ARM®, ACoM, and AMO®, demonstrates a commitment to, and passion for, good management. These credentials, along with our courses and array of resources, all exist with one goal in mind – to make a difference in the careers of those who manage.

The International Council of Shopping Centers (ICSC):

Founded in 1957, the International Council of Shopping Centers ("ICSC") serves the global retail real estate industry. We provide our 70,000+ member network in over 100 countries with invaluable resources, connections and industry insights, and actively work together to shape public policy.

ICSC members include owner/operators of retail properties, developers, retailers, investors, brokers, attorneys, academics, and public officials. Retail real estate is a significant job creator -- directly supporting 34.8 million jobs (1 in 6 jobs is retail real estate-related) and accounts for $840 billion in wages annually. Our industry is a driver of GDP and a critical revenue source for the communities they serve through the collection of sales taxes and the payment of property taxes. Retail real estate is broadly recognized for the integral role it plays in the social, civic and economic vibrancy of communities across the globe.

Nareit:

Nareit serves as the worldwide representative voice for REITs and real estate companies with an interest in U.S. income-producing real estate. Nareit's members are REITs and other real estate companies throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

The National Apartment Association ("NAA"):

NAA is a trade association for owners and managers of rental housing. NAA is comprised of 150 state and local affiliated apartment associations. NAA encompasses over 81,000 members representing more than 9.6 million rental homes throughout the United States, Canada, and the United Kingdom. NAA, which is the leading national advocate for quality rental housing, is also the largest trade organization dedicated solely to rental housing. As part of its business, NAA advocates for fair governmental treatment of rental housing businesses nationwide, including advocating the interests of the rental housing business community at large.

The National Multifamily Housing Council ("NMHC"):

Based in Washington, D.C., the NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 39 million Americans who live in apartments today and contributing $1.3 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and nearly 19 million U.S. households live in an apartment home (buildings with five or more units).

The National Real Estate Investors Association ("National REIA"):

The National REIA is a 501(c)6 trade association. We are a federation made up of local associations or investment clubs throughout the United States. We represent local investor associations, property owner associations, apartment associations, and landlord associations on a

national scale. Together we represent the interests of approximately 40,000 members across the U.S. As such, we are the largest broad based organization dedicated to the individual investor.

The Real Estate Roundtable ("RER"):

RER brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate industry trade associations to jointly address key national policy issues relating to real estate and the overall economy. By identifying, analyzing, and coordinating policy positions, The Roundtable's business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, RER members' portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than $2 trillion; over 1.5 million apartment units; and in excess of 2.5 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

EXHIBIT B
Declaration of Kimberly Grimm

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF KIMBERLY GRIMM IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Kimberly Grimm, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Executive Vice President of Development for Continental Properties Company, Inc. ("Continental"). Continental is a national developer, owner and operator of high-quality apartment homes across the United States. In 2018, we were listed as the eighth largest developer of apartment homes by the National Multifamily Housing Council ("NMHC") and based on reported information, we are the largest garden style, suburban apartment developer in the United States. We typically commence construction on approximately 3,000 new apartment homes per year. We have developed over 23,000 apartment homes and are currently managing approximately 15,000 apartment homes with another 4,600 apartment homes under construction.

3. I have served as Executive Vice President of Development since 2017. I have previously served in comparable positions since 2006 at Continental, and I have over 25 years of experience in real estate with over 10 years of experience specifically in the multifamily industry. In my position at Continental, I am responsible for development of new multifamily communities which includes leadership of market research, project sourcing and entitlement/permitting of projects. I am an Officer of the company where I assist with strategic planning for the company and I am a member of Continental's Investment Committee which determines where Continental will place its capital and resources along with the approval of projects for development. I also participate in NMHC's Workforce Housing Committee.

4. Continental currently owns a total of 57 apartment communities, comprising of 15,300 apartment homes located in 18 states. Of the apartment homes we manage, 57% of those homes qualify at 80% of HUD's AMI. For example, in Austin, we developed three communities totaling 844 apartment homes; all of these homes qualified at 80% of AMI.

5. Continental develops property in several markets across the United States such as Memphis, Louisville, Fort Myers, Minneapolis metro, Dallas metro, Denver metro along with Chicago metro to name a few of the markets in which we develop.

6. Continental develops garden style communities known as the Springs. The Springs communities consist of two-story residential buildings with all apartment homes having direct access into each home. Each residential building has anywhere from 20 to 28 homes with some buildings having attached garages. Each community ranges in size from 200 to 340 homes and features a community center, resort style pool area, a fitness room and pet playground. The size of the community depends on market conditions and land configuration.

The same business model and Springs product is used across all of the suburban markets that we develop and operate in. Continental project costs range between $35,000,000 to $68,000,000 per project which does not include our labor or other overhead costs. The capital for this comes from private debt and equity. We receive private debt for approximately 75% of the total project costs with the remaining coming from private equity sources. It takes us on average 3.5 years from land identification to a fully occupied community and within that 3.5-year period, it takes us on average 11 months to obtain the entitlements and permits depending on the municipality. Our costs to pursue a project from land identification through the time we commence construction on the site have significantly increased over the years due to municipal requirements.

7. Multifamily housing development typically encounters a wide range of barriers that impact costs and ultimately the rents paid by American families. For more detail on the regulatory barriers we typically encounter, see the testimony of Continental's CEO, Jim Schloemer on the challenges faced by multifamily developers before the House of Representatives Financial Services Committee. His full testimony is available at: https://financialservices.house.gov/uploadedfiles/09.05.2018_james_schloemer_testimony.pdf

8. The typical Continental project is an example of cost and the complexity of multifamily development. Any project will take years to complete, and total development costs will routinely be in the tens of millions of dollars regardless of whether it is urban, rural or suburban.

9. The development of multifamily properties is never a simple or easy process. Even in suburban and exurban areas great skill, effort, and expense are required. The cost of development varies substantially, depending on the size of the project and a range of other variables, from local land and labor costs, to the cost of financing. A typical Continental project costs approximately $48,500,000. Continental does not receive any type of municipal assistance such as TIF dollars to provide this housing across the United States.

10. To fully understand the challenges involved in multifamily development, one must understand the many steps and components of the process.

a. First, a property developer must determine whether there is going to be a need for housing in a particular area when the project is completed. The economy and the housing market are cyclical, so there is always a risk that when a new community opens, local demand will not support a new rental apartment building in that area at that time or market conditions change and the forecasted rent is no longer viable.

b. Before a developer can build, it must acquire the necessary land, but it must also be confident that local planning and zoning requirements will permit the kind of development the developer has in mind. Thus, the developer must conduct two sets of negotiations: one with landowners and another with local planning authorities. These negotiations can be fairly straightforward if there is a willing seller who owns a suitable parcel in an area that is already approved for multifamily development. On the other hand, if a parcel must be assembled from multiple landowners, or if zoning or comprehensive plan changes are required, the process can be very complex and long. In any case, the legal fees and other transaction costs are significant.

c. Architectural design, civil engineering plans, and construction plans must be prepared and approved by local authorities. Again, this may be straightforward for one project, but it may not be on another. And again, there are costs. Approximately $850,000 is spent on each project to obtain the local municipal approvals for such items as civil engineering, due diligence, municipal fees and architectural plans. Some of these dollars are written off due to the inability to obtain municipal approvals because of lack of support from the governing bodies or due to the burden of the regulations.

d. Actual building construction may take less time than the acquisition and approval processes. But building construction has to wait for the site development activities to be completed such as sewer, water, electric, gas and communications utility connections which are critical to the development of the site. Site development and building construction can take 24 months for a typical Continental property in the suburban locales. In many instances, this timeline is extended due to lack of cooperation by the local utility companies.

e. Once construction is complete, a new community cannot open until the local government issues an occupancy permit, which requires another lengthy process of a variety of inspections and paperwork required by the local municipality for the site and buildings. Any public work such as public utilities and roadway improvements that were required to be constructed by the developer in order to obtain the municipal approvals require further scrutiny via inspections and paperwork for one or more municipal jurisdictions. Some municipalities are short staffed so days are lost waiting on inspections and the completion of paperwork.

   The typical lease up period for a Springs community is approximately 16-18 months to reach full occupancy.

f. It can take anywhere from 6 months to a year (sometimes longer) to identify a site in a market. From land identification to full occupancy, it takes approximately 3.5 years for a typical Continental development. This timeframe will be extended due to the local municipal entitlement/permitting approval process, their ability to review plans in a timely fashion, and if changes are requested by the municipality after plans are approved and construction has commenced. It is a common occurrence that a local municipality will revise their approvals and ask for additional items after construction has commenced. This not only adds to the timeline, but also increases costs and potentially threatens the viability of the project.

11. Construction of multifamily rental properties goes beyond traditional brick and mortar and also includes substantial investments by Continental in building out communications networks to ensure a premium level of connectivity for residents.

12. It is typical for Continental to invest $50,000 to $150,000 dollars in building out a communications network at its properties that supports broadband, video and voice connectivity. Ultimately this adds to the total cost of development and why partnerships with providers are so key as we work to limit the impact of development costs on the rents our residents pay.

13. Residents of a typical Continental property has access to broadband Internet service from providers such as ATT, Comcast, Cox Communications, Spectrum, Nexgen, Grande Communications, Dish, DirectTV and Suddenlink. Continental works with the local communications companies to provide excellent broadband, TV and internet service to all of its residents. Continental typically works with larger, more reliable vendors in order to meet all of our timelines while still providing excellent service to our customers. And while we want very much to offer residents competitive choice of broadband providers, this is often very difficult or simply not possible in the markets in which we operate. Depending on local availability, which is often limited where Continental builds, serviceability, timeframes and quality of service have a big part to play in who ultimately is able and willing to serve our residents. Continental is on a very tight timeline to make these projects work so protracted contract negotiations are problematic and often driven by the communications company. Any door fees or incentives from the communications companies are used to offset the costs incurred to provide service and infrastructure, but the door fees typically do not offset all of those costs. Despite that, Continental continues to prioritize the delivery of high-quality broadband service to our residents.

14. Despite the high priority Continental places on building out broadband networks and ensuring residents have a choice in providers, the reality of making this happen is not always easy. Continental treats communications services like a utility, similar to water, electricity or gas. Communications providers, particularly where Continental builds, are the only provider in the area and often provide a poor level of support to our projects. The necessity of getting our projects built with reliable providers, reasonable costs, and excellent service are the most important factors in our decision-making process. Specific vendors are particularly challenging. Spectrum in the Midwest has caused our properties to have delays on several sites due to disorganization, Century link has caused numerous delays due to growth issues causing delays in several of our Colorado projects and even ATT, which we consider a top vendor, has had numerous issues around the country delaying service to residents. More often than not the contract negotiation process with communications vendors can take months or simply hit impasses which are not overcome, as in the example of Cincinnati Bell. Other companies simply take so long to handle contract negotiations that it makes our timelines extremely challenging to hit. Spectrum is notoriously difficult to deal with, including inordinate times to get contracts back, and refusing to have meeting with Legal teams.

15. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 28th day of August, 2019, at Menomonee Falls, Wisconsin.

EXHIBIT C

A Snapshot of Multifamily Development

To give policymakers a sense of the practical challenges faced by multifamily housing developers, one has to look no further than the historic Shaw neighborhood of Washington, DC.

The Bozzuto Group, a large regional real estate firm, aided in the development of a transformational multifamily project. As the property manager, Bozzuto provided assistance to the owner and lead developers of the project while they navigated a long and painful entitlement process only to realize operation after 12 years. The property served as the anchor to the redevelopment of a historic area of our nation's capital and at its core is the O Street market, which sits on a 3 ½ acre site. At one time, it was a thriving public market built in 1881 and served the surrounding neighborhood as both a center of commerce and community. After a troubled history following riots and gang violence, the market closed in 1994 and laid empty until the current project got underway.

In the early 2000s, developers saw an opportunity to reinvent the area and combine the O Street Market, which is listed on the National Register of Historic Places and 8th Street, which was part of the original L'Enfant plan for Washington, DC into one large, iconic and transformational development for DC. The development team collaborated with 3 mayoral administrations to secure approvals, financing and a development program that would accommodate community expectations.

The lead project developer teamed up with a local affordable housing developer for the development of The Hodge on 8th. By putting all affordable apartments in one building on the site allowed for 15% more units to be created. The building serves seniors with median incomes below 60% of the median income.

Development was not easy—the site was purchased in 2001. Construction began a decade later in 2011 and both the historic market and the apartments opened in 2013. The market-rate apartments leased up within a year of opening – a record pace by any measure – and the affordable, senior housing building—the Hodge was 95% leased before it even opened and maintains an on-going waiting list of over 500 seniors.

The project was financed with a complicated stack of 12 different private and public financing sources totaling $315 million, which included:

- Private land and cash equity investments
- $102 Million of EB-5 financing
- Mezzanine debt
- $35 million in TIF bond proceeds
- $128 million Section 220 HUD loan – the largest ever granted for a mixed-use development
- LIHTC and tax-exempt bonds from the DCHFA and Home loans secured by the DCHCD

The mixed-used community now features:

- 90K square feet of retail
- 549 market-rate apartments – in three buildings
- 90 affordable apartments in a 4th building for senior citizens
- 182 room/suite hotel
- Preservation of a historic market that houses a Giant grocery store.

The entitlement process, regulatory hurdles at the federal and city levels as well as the need for so many different sources of funding for this project took a significant amount of time to overcome. And while no two projects are exactly the same, the challenges they face often are. In this case, the project is a raging success serving as the anchor to a revitalizing neighborhood and catalyzing over $1 billion in new investment since its inception by bringing new jobs and new businesses to the area. In addition, the developer and construction

firms privately funded skills training resulting in 51% of new construction jobs going to DC residents and awarding $192 million in project contracts to minority owned businesses.

EXHIBIT D
Declaration of Sadler/Pye

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF REALPAGE IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

RealPage's SmartSource Resident Technology Group (also referenced to as "We" or "Our" throughout), include Henry Pye and Steve Sadler, declare as follows:

1. We submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.
2. Henry Pye currently serve as vice president and Steve Sadler as director multifamily development for Realpage's SmartSource Resident Technology group. The group is an industry-leading technology and design consultant assisting owners, managers, developers, and general contractors (each a "Client") to negotiate and design the best possible resident-facing services and technologies.
3. Henry Pye has served as vice president since 2009. Henry Pye has served in comparable positions since 2001. Steve Sadler has served as director multifamily development since 2014. Steve Sadler has served in comparable positions since 1990.

4. Henry Pye and Steve Sadler are active in the multifamily industry having authored dozens of articles and frequently speaking at industry conferences and have been frequently recognized for their efforts. For example, Broadband Properties Magazine has included both Henry Pye and Steve Sadler in its quadrennial listing of the "Most Influential People in Real Estate & Technology" since 2002.
5. Realpage's SmartSource Resident Technology group is currently working on over 300 apartment communities, comprising over 75,000 units.
6. With team managers averaging over 25 years of experience, the team has collectively assisted thousands of developments and communities in 42 states, the District of Columbia, Canada and the United Kingdom.
7. Residents demand access and expect a choice. Furthermore, residents have other options in deciding where to live. With average leases at thirteen months or shorter, reducing resident turnover is a major concern for community managers. If the client’s community cannot meet resident needs, they can and will move. In short, Realpage's SmartSource Resident Technology group has a powerful incentive to ensure that multiple providers provide reliable, high quality, and high-speed broadband service to Our Clients' communities.
8. That is why Realpage's SmartSource Resident Technology group usually recommends that each Client community have at least two broadband vendors wherever possible. These vendors typically include the local franchised cable operator, the local telephone company's broadband product, and often one or more independent internet service providers ("ISPs"). We estimate that 75% of Our Client's communities have two broadband vendors available, and another 10% have three or more.

9. Most communities receive services from the franchised cable multiple system operator ("MSO"). The MSOs have such a large and storied presence in the markets, are prepared to serve all of Our Clients' communities, and residents expect to have their service as an option.
10. Residents are very much aware of the existence of broadband service from the local exchange carrier, and where such service is available, Our Clients need to offer that option to meet resident demand. In most cases, Our Clients can accommodate that demand. However, in many regions, the local exchange carrier cherry-picks the areas where they will deploy fiber and, in some instances, demand significant fees to do so.
11. The newer competitive ISPs are a good alternative, but their service is typically only available within their footprints where they have built out metro fiber networks. Thus, for some of Our Client’s communities, there are no competitive ISPs available to provide broadband service. Furthermore, even within their fiber footprints, ISPs often will only serve communities where the fiber build out is financially justified. Our Clients are always open to service from such providers, both fixed wireless and fiber-optic-based, and have entered into agreements with multiple independent vendors including Gigamonster, DirectPath, Pavlov, Single Digits, National Wi-Fi, Boingo, Whitesky, Hotwire, Apogee, Korcett to serve their communities.
12. Our Clients do not sell broadband service or profit from providing space to broadband providers. Their business is to provide residents with a great resident experience. Furthermore, Our Client’s communities are surrounded by other communities vying for the same residents. High quality, reliable broadband service is a capability a multifamily community must offer to attract residents. If a community does not have a viable broadband service, the surrounding competing communities are quick to do so. This competition for

residents, which community managers are engaged in every single day, is the most important facet of Our business and drives all of Our decisions.

13. The terms and conditions of the Client's agreements with broadband providers depend on their needs and policies. None of Our Clients are in a position to demand that any particular provider serve any of their communities. Because the providers know that it is essential for any community to be able to offer residents access to their services, they have considerable bargaining power.

14. Usually, one of Our Clients will turn away an incumbent provider only when there are already two or more broadband options, and the Client cannot afford to build out facilities to support an additional vendor.

15. The largest national telecommunications companies that offer fiber-based broadband service, Verizon, AT&T, and CenturyLink, routinely insist on installing and retaining title to their own distribution and fiber home run to each unit's structured wiring panel, which is not negotiable. By owning the fiber home run they retain control over and prevent use or access by other competing telecommunications companies. These broadband providers do not enter into exclusive wiring agreements, because they are not using any of Our Client's/Owner's wiring to get to the units. As a practical matter, these broadband providers policies result in de-facto exclusive wiring arrangements and put them in the same position as the cable MSOs: both sets of companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each unit. The cable MSOs negotiates for the exclusive right to use wiring that Our Clients own and the MSOs agree to maintain that wiring, while the telecommunications carriers bear the cost of installing the fiber over which they have exclusive control and agree to maintain. From a

financial perspective, these two positions are roughly comparable as far as We are concerned

16. Competitive ISPs also install fiber from the minimum point of entry to each unit's structured wiring panel or an intermediate closet (Intermediate Distribution Frame - IDF) a short distance from the unit. When an ISP installs fiber to each unit, there is no need for the ISP to connect to any Owner-owned wiring except for the wiring inside the unit. However, when the ISP extends its fiber only to the IDF closet, there must be some Owner-owned wiring available for the ISP to run its signals from the IDF closets to the units. Often ISPs can use Category 6 or Category 5(e) wiring to carry their signals to the units if such wiring exists at the community. In principle, Our Clients/Owners have no objection to allowing such providers to use any such wiring, but in practice, that wiring may not exist at an existing community. If a local exchange carrier owns the fiber to the unit and if the incumbent MSO uses the coaxial cable to deliver its services to the units, there may not be any wiring available for the ISP.
17. Many of the competitive ISPs that Our Clients contract with prefer to install fiber to the unit’s distribution panel for the same reasons as the telecommunications carriers. Understandably, it is challenging for any provider to deliver reliable service over a network if other entities have the right to disconnect and use the home run wiring on a unit-by-unit basis.
18. We commonly recommend that Our Clients enter into marketing agreements with all types of providers. However, Our Clients do not require it as a condition of granting access to a community. In a typical marketing agreement, Our Clients agree to market the specified services and provide facilities (conduit, wiring, and power) to enable them In return for

assisting with marketing their service, the providers will typically pay some compensation to Our Clients. Often this compensation is a percentage of the provider's recurring revenue it collects from its resident subscribers at the community. The percentage of revenue shared increases as the provider's penetration rate increases. The revenue share can range from zero to eight%, depending on the provider's penetration in the building; in reality, however, the amount Our Clients receive typically falls in the range of two to six percent, because higher penetrations are seldom realized. The service providers have continued to narrow the designation of revenue qualifying as a revenue share while simultaneously lowering the revenue share percentages. Consequently, total income to Our Clients from these marketing contracts results in a fraction from that received a decade ago when penetration rates for voice, video, and broadband services were higher, the definition of revenue broader and provider marketing budgets far larger.

19. We recommend non-exclusive marketing arrangements with multiple providers at a single community whenever possible. Income from marketing efforts is referred to as "ancillary income" because it is subordinate and a tiny percentage of overall leasing revenue.
20. Periodically, We consult with a few communities where the owner decides that only one provider has exclusive marketing rights. However, at many of the communities where one provider has exclusive marketing rights, other providers are still serving Our Client’s residents either without a contract or in some cases with a contract that does not include marketing rights (an "access only" contract). Residents gauge which providers offer services in the community based on the providers various advertising and marketing efforts in the community. While Our Clients exclusive marketing agreements grant certain rights to the respective providers, they do not prohibit on-site staff from answering questions from

residents about the availability of other services. Consequently, it is not difficult for residents to learn whether there is a competitive alternative in their building.

21. Agreements for installing facilities in new communities utilize the same model described above, except that, because there is no existing wiring in the building, part of the negotiations We undertake, on behalf of the owner, and the cable MSO typically involve which party will bear the cost of providing and installing the Home-Run wiring that will be used by the MSO. If the owner assumes some or all of the cost, the cost is often offset in part by the compensation the MSO pays under the marketing agreement. Regardless of which party provides and installs the Home Run wiring, the owner maintains title to that wiring. With AT&T, Verizon, and Centurylink this negotiation does not occur as they routinely insist on installing, owning, and exercising exclusive control over their fiber home run lines to each unit.

22. For the most part, providers prefer to use their technicians or contractors for the installation of their facilities, rather than having the owner's contractors perform the work. In new construction, the community often installs microduct provided by the cable MSO, and their contractor will later install the wiring or fiber optic cable within the microduct. On the other hand, Verizon and AT&T typically install both the microduct and the fiber. One reason We often prefer the MSO approach is that the owner can control the timing of installation of the microduct creating fewer concerns that the construction of the entire community will be delayed when AT&T, Verizon, and Centurylink fall behind.

23. The following table estimates the types of providers and agreements that RealPage SmartSource Resident technology has recently worked on, excluding communities at which broadband service is available on a bulk basis:

Types of agreements for new communities We have assisted during past 24 months

	Number of Communities	Percentage of Portfolio	Number of Communities	Percentage of Portfolio
Communities with one broadband provider	54	16%		
Exclusive wiring rights			0	0
Use of owner wiring			75	15%
Use of provider wiring			75	15%
Exclusive marketing rights			75	15%
Communities with two broadband providers	248	75%		
Exclusive wiring rights			0	0
Use of owner wiring			248	75%
Use of provider wiring			248	75%
Exclusive marketing rights			33	10%
Communities with more than two broadband providers	30	9%		
Exclusive wiring rights			0	0
Use of owner wiring			30	10%
Use of provider wiring			30	10%
Exclusive marketing rights			0	0
TOTAL number of communities	332	100%		

24. The ancillary revenue Our Client's communities receive from providers is important because all revenues attributable to a building affect the profitability of the community. But at the same time, the revenue earned from communications providers at every one of Our Client's communities is miniscule compared to both the investment in buildings and the income they receive from the residents in rent. The loss of one or two residents exceeds the value of almost any revenue share remunerated in exchange for marketing assistance.

25. In construction for new communities, the owner will typically bear 85% to 90% of the in-unit and home-run wiring cost. Within the apartment units, wiring costs borne by the owner can range from $500 per apartment to as much as $1,200 per apartment. This will depend on construction type, apartment configuration, the owner's desire to provide a higher or lower level of wiring flexibility within the apartment, and the number of providers being supported. Unless fiber is extended all the way to the apartment, the owner is usually responsible for all cabling from the intermediate telecom room to each apartment's low voltage distribution panel. Coaxial or Cat-6 wiring generally costs between $80 and $120 per apartment. Some providers will provide the Home Run cabling material and ask the owner to install that material for them. Some providers will offer a cost offset for this labor but typically is only about half of the actual cost.
26. The service provider is generally responsible for the distribution/backbone wiring, but competitive ISP providers in particular often require the owner to contribute to this cost. In any case, each provider's distribution and backbone network requires owner-provided conduit. The cost of this conduit may equal or exceed the cost of the wiring itself.
27. In existing communities, the service provider will usually retrofit new service to one location in each unit. Any other costs, including inside wiring upgrades, are exclusively borne by the owner. The owner is also responsible for any new or additional power requirements. The general cost to add a broadband drop/faceplate within an existing apartment unit is $100 to $150 per location. The cost to add a power outlet within an existing apartment unit is between $150 and $300 per location.
28. The two other costs related to overbuilds and upgrades include oversight by the management team and building repair and landscaping. The management team must manage access to each building, floor and unit, as well as oversee the entire process and communicate with the residents. While the service provider is theoretically responsible for returning the community to the same state it was in before construction, there are always items left to the property owner to correct, at its expense.

29. It is theoretically possible for two vendors to simultaneously share a wire or fiber but is never prudent. Wire sharing introduces the possibility of interference on the other providers service which would be difficult to trouble shoot, nearly impossible to cure and would inevitably create a poor resident experience.
30. Wire sharing is not practical and violates network standards as defined by the EIA/TIA standards organizations and BICSI education/certifications.
31. New communities complying with modern energy codes are shielded by radiant barriers and low-E windows. When combined with modern structural supports such as reinforced concrete, tunnel form, load bearing exterior wall, and Prescient/Infinity load bearing metal stud systems, owners must deploy Distributed Antenna System (DAS) systems to provide mobile service within apartment buildings. These systems may cost from $200,000-600,000 to construct and thousands of dollars more to operate with no direct offsetting revenue. The coming deployment of 5G and the millimeter waveband that provides the promised broadband speeds could force even more communities to buildout and operate expensive DAS, Citizens Broadband Radio Service (CBRS) or Wi-Fi systems while increasing the corresponding monthly expense for bandwidth.
32. The exterior impediments and structural challenges that limit mobile telephony similarly affect emergency responder wireless communications systems. Increasingly, owners are required to provide Emergency Responder Radio Coverage System (ERRCS) systems. These systems are incredibly expensive costing anywhere from $300,000-700,000 with no offsetting revenue.
33. As a result, many apartments developments have to spend $500,000-1,300,000 to support wireless communications for residents and emergency responders. Moreover, DAS, CBRS or Wi-Fi systems require maintenance, periodic expensive upgrades, and an increasingly large monthly bandwidth expense of between $8-25/unit/month.

34. Importantly, Wi-Fi systems as a replacement for DAS or CBRS is perhaps the best opportunity for open competition for broadband services for apartment communities. While many MSOs and ILECs have managed broadband services groups providing Wi-Fi services, they have struggled to compete with Non-Franchise Providers.

This declaration was executed on the 30th day of August 2019, at Durham, North Carolina and Atlanta, Georgia.

Henry Pye

Steve Sadler

EXHIBIT E
Declaration of Art Hubacher

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF ART HUBACHER IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Art Hubacher, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I am a licensed attorney and currently serve as the Managing Member for Hubacher Ames & Taylor, PLLC (HA&T), a law firm that represents a variety of real estate clients in the multi-family housing and commercial sectors, providing counsel on issues involving the deployment and implementation of broadband services in the real estate sector. HA&T's clients include some of the nation's largest developers, real estate investment trusts, and property management groups with portfolios that, in the aggregate, includes thousands of MTEs that contain hundreds of thousands of residential and commercial units. HA&T also represent smaller MTE owners and managers, some of whom own or manage only one individual property, as well homeowner associations and condominium associations.

3. One of HA&T's core practice areas is representing our real estate clients in drafting and negotiating agreements with a wide variety of service providers that set forth the terms and conditions broadband services deployment to residents of our client's MTEs. These agreements include access agreements, service contracts, license agreements, easements, marketing agreements, DAS contracts, site and rooftop leases for wireless carriers, and similar contracts that are routinely entered between broadband service providers and MTE owners or managers (hereinafter, collectively "MTE Owners"). In 2018, our firm worked on more than 600 of these type of agreements for our real estate clients.

4. Our firm was founded in 2011, originally as Hubacher & Ames, PLLC. I have served as Managing Member since the firm's original inception in 2011. I have more than 21 years of legal experience handling contracts in this intersection of the technology industry and the real estate sector. I have practiced in this area of law since 1998. Prior to this form's formation, I practiced at Arent Fox LLP from 1998-2001 and Costlow & Hubacher, P.L.L.C. from 2001-2011. Although we are a small firm, we were named as one of "The Top 100 MDU Technology Providers" by Broadband Communities magazine for five consecutive years. I was also recognized at the 2019 Broadband Communities Summit as the recipient of this year's "Outstanding Multifamily Partner Award."

5. In 2017, I submitted Reply Comments on behalf of our predecessor firm (Hubacher & Ames, PLLC) pertaining to the Notice of Inquiry in the above referenced docket (see Reply Comments of Hubacher & Ames, PLLC re GN Docket Number 17-142 - Improving Competitive Access to MTEs, Filed August 22, 2017) (hereinafter, the "Reply Comments"). In those Reply Comments, our firm provided data to show that the current market was "robust" and working well in the MTE sector to bring a choice of competitive broadband services to tenants of

MTEs and we urged the Commission not to interfere in such market and not "to impose restrictions on the type of business arrangements and contracts typically entered by and between MTE Owners and service providers." We attached two appendices in those Replay Comments: (A) one that summarized the contracts our firm had negotiated for our clients new build residential projects during the first 7 months of 2017, and (B) a second appendix that summarized the contracts our firm had negotiated for fiber overbuild projects at existing residential properties during the same time period.

6. To refresh the Commission's record, we have provided updated tables that cover the contracts our firm negotiated in calendar years 2017 (the entire year) and 2018. Appendix A attached hereto is a list of new build residential projects we worked on during this time period; Appendix B attached hereto is a list of existing residential properties that have been upgraded with fiber to increase the choice of broadband services during this time period. We have intentionally not included any properties on either appendix where bulk service contracts were entered as the Commission has not raised any questions pertaining to the potential regulation of bulk service contracts

Summary of New Build Data

7. As set forth on Appendix A, this firm handled contracts at more than **110** new build residential MTEs during 2017 and 2018. Per Appendix A, **85%** of all new build projects will have at least two broadband providers available to residents and more than **22%** of those projects will have three or more broadband providers available for residents to choose among.

8. As Appendix A reflects, it is common for new build residential MTEs to enter exclusive wiring contracts with multiple providers at a single MTE as that is the method my clients prefer for ensuring that wiring is properly repaired and maintained to avoid service

disruption to residents (see Reply Comments, Appendix Three, Declaration of Kevin Hott). Also, as Appendix A hereto reflects, it is now a common practice for MTE Owners to enter multiple non-exclusive marketing contracts with various providers at a single MTE. Three quarters (**75%**) of the new build projects we handled included non-exclusive marketing agreements with multiple providers. Even for the 25% of the new build projects where marketing rights may be exclusive to one provider, other providers are often still willing to deploy services on an "access only" basis – one in which the service contract provides no marketing rights to the provider. As noted on Appendix B, we negotiated contracts for **twelve** new build developments where one provider had exclusive marketing rights but another provider installed facilities and deployed services under an "access only" contract.

Summary of Existing Property Overbuild Data

9. As set forth on Appendix B, this firm handled "overbuild" contracts at more than **70** existing residential MTEs during 2017 and 2018. As used herein, the term "overbuild" encompasses two situations: (i) a service provider upgrades its copper facilities at an existing MTE and replaces or supplements those copper facilities with new fiber lines that typically extend all the way to the residential units (See table one of Appendix B), and (ii) a service provider who is a new entrant to an existing MTE installs fiber facilities and becomes a new option for residents (see table two of Appendix B). In both situations, residents will receive a benefit – either in the form of improved services resulting from the upgrade from copper to fiber or in the form of a new broadband provider who offers a competitive choice of services for the residents.

10. Note that the providers who were willing to perform these overbuilds did so in situations where they received marketing rights and also in "access only" situations. As noted on

Appendix B, we negotiated overbuild contracts for **16** existing MTEs where an incumbent service provider had exclusive marketing rights but the over-builder installed facilities and deployed services under an "access only" contract.

11. It should be noted for the record that our firm has seen a great decrease in the number of overbuild contracts being pursued with AT&T since late 2018. AT&T had been a prolific over-builder of existing copper projects until it abruptly curtailed its fiber overbuild program as of November, 2018 to the point that such program has been practically eliminated. In my experience, when service providers like AT&T and Verizon decide for whatever reason not to perform fiber upgrades at their existing copper properties, such decisions are detrimental to the efforts of my clients to increase the quality of broadband at their existing MTEs.

The Importance and Significance of MTE Contracts with Service Providers

12. The contracts that are entered by and between residential MTE Owners and broadband service providers are often complex documents that cover a number of important elements that are beneficial to residents. Significantly, they provide contractual solutions and remedies to issues and incidents that negatively impact residents' experience with service providers. When providers serve MTEs without a contract, an occurrence that is made more likely by mandatory access laws, there is no mechanism in place that spells out how an issue might be resolved that impacts the residents' experience and what the MTE Owner might be able to do about it: Who is responsible to repair damaged wiring that impairs the residents service? Why is the provider's service not available even though the Property has already opened? Why are residents complaining about low broadband speeds? What can be done about the interference and outages the residents experience? Absent a service contract, the MTE Owner has few tools to help its residents resolve these issues.

13. These type of issues and problems are often easily resolved if there is a contract that sets forth the rights and responsibilities of the parties. These contracts often cover a lot of territory and are professionally negotiated instruments. They come in many flavors: access agreements, license agreements, service contracts, and right of entry agreements are commonly used terms. Whatever their title, the main functions of these contracts are two-fold: (i) to spell out the terms and conditions of the service provider's access to the MTE for the installation and/or ongoing operation of the provider's infrastructure and the terms of the provider's use of Owner-owned infrastructure; and (ii) to spell out the terms and conditions of the provider's deployment and ongoing provisioning of certain services to the MTE.

14. Well-drafted contracts between MTE Owners and service providers typically, at a minimum, cover the following important areas:

- Access rights of providers (typically a license or recordable easement)
- Installation obligations of each party (see discussion below about Matrixes)
- Deployment dates (when will the provider's service be available to residents)
- Maintenance obligations (who is responsible for repairing damaged infrastructure)
- Service definitions and speeds (what services and speeds will be available)
- Service level agreements (what are the provider's responsibilities to perform resident installations and respond to outages and residents' service requests)
- Consideration to the MTE Owner (see discussion below)
- Assignment provision (what happens to the service provider's rights if the Property is sold. Without a contract, the provider could lose all rights to serve the MTE when a new owner takes over).
- Length of the contract (Term)
- Provision covering damage to the MTE caused by the service provider
- Indemnity provision

- Insurance provision
- Casualty provision (what happens to the provider's rights if the property is destroyed)
- Marketing rights (included in some but not all contracts)
- General contract provisions that are standard in many transactions (e.g. force majeure, default and remedies, notices, limitation of liability, representations and warranties, etc.)

Contracts that include these items often help MTE Owners resolve issues that invariably arise when there is a problem with a service provider's deployment or when residents have complaints about the broadband services they receive or that they wish to receive (see Reply Comments, Appendix Three, Declaration of Kevin Hott). In addition, some providers will guarantee a certain level of broadband speeds in their service contracts with MTE Owners. For example, AT&T will guarantee that gigabit speeds will be available to residents in contracts where AT&T is using a fiber-to-the-unit deployment. Wave G will also include a gigabit service offering in contracts for both new build developments and overbuild situations where Wave G is a new entrant to an existing property.

Construction Matrix and Consideration in Contracts with Service Providers

16. In new build contracts, one of the most critical components to be negotiated is the obligation of each party to construct the components of broadband system that the provider will use to deliver broadband services to the MTE. The contract sets forth which party will be responsible for providing and installing necessary components, including elements like conduit, wiring, wiring panels and electrical sources. Because there are different deployment methods, the parties also negotiate what type of materials are used, for example fiber or coaxial home run wiring. There is no one-size fits all formula for these duties. Each MTE is different and the parties actively negotiate which party will be responsible for which components. In some cases,

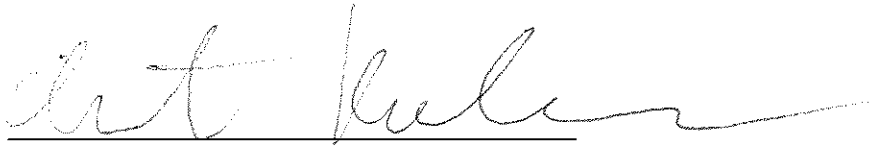
a provider will provide certain materials (such as coaxial cable or microduct) while the MTE Owner will be responsible for installing those materials. These negotiations can be complex because there are obviously costs involved for the party that is obligated to provide and/or install the materials. To memorialize these responsibilities, most of our firm's new build contracts include a *Construction Matrix* that gets attached as an exhibit and sets forth each party's obligations for the provision of materials and the labor for installing those materials. Attached are several examples of the type of *Construction Matrix* that we have used in our contracts with service providers (see Appendix C). These matrixes are extremely useful in helping the parties prepare for a smooth deployment by the service provider. From the MTE Owner's standpoint, these matrixes also help from a budgeting standpoint as the Owner's responsibilities are clear in terms of materials and labor so the Owner's costs associated with such responsibilities can be projected.

17. Consideration to the MTE Owner is another element that is included in most, but not all, of the contracts we negotiate for residential MTEs. Consideration is a necessary element of any contract. Monetary consideration from service providers takes a number of different forms and is characterized a number of different ways depending on the particular contract. Door fees, revenue share, construction reimbursements, rent payments, and marketing fees are among the various ways the consideration is labeled in the contracts. Typically the service provider has a certain way it labels the monetary consideration, presumably for accounting or tax reasons or other similar purposes. In most situations, the MTE Owner does not care how the monetary consideration is labeled or how the service provider wants to characterize it (however it should be noted that some MTE Owners have tax issues that restrict those MTE Owners from receiving "marketing" fees). MTE Owners rightfully treat the

monetary payment as the consideration that the service provider is paying in exchange for both the rights that the provider has been granted in the contract and the requirements the MTE Owner is obligated to perform pursuant to the contract. As set forth above, MTE Owners are typically required to bear the costs for a lot of the infrastructure that the service provider needs to deploy its services to the MTE. In addition, the MTE Owner has likely expended millions and millions of dollars to develop the MTE that creates the environment for the service provider's services in the first place. Meanwhile, in addition to the real costs incurred by the Owner to create that environment, service providers routinely ask for access rights at real property that at times create an encumbrance to Owner's title to the real estate (such as easements or other recordable documents like a Memorandum of Agreement). These access rights granted to the service provider and the infrastructure obligations that MTE Owners incur under the contract are elements of a bargain that are being negotiated between two parties to a commercial transaction. Financial consideration to the MTE Owner is another part of that bargain. MTE Owners often use that consideration to help them offset just a fraction of the costs they have incurred in developing the MTE and contributing to the broadband infrastructure the provider uses to deliver its services.

18. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 30th day of August, 2019, at Fairfax, Virginia



Art Hubacher

APPENDIX A

New Build Projects 2017 and 2018

(See Attached)

Key

NEMA = Non-Exclusive Marketing Agreement

EMA = Exclusive Marketing Agreement

Access Only = Agreement with no marketing rights for the provider

Property Location	Number of Units	Providers Under Contract	Provider Contracts that include Exclusive Wiring Rights	Type of Contracts
Denver, CO	171	4	2	4 NEMAs
Denver, CO	238	4	2	4 NEMAs
Kirkland, WA	339	4	2	4 NEMAs
Charlotte, NC	286	3	2	2 NEMAs
Portland, OR	212	3	2	3 NEMAs
Houston, TX	283	3	2	2 NEMAs
Menlo Park, CA	183	3	2	3 NEMAs
Oakland, CA	247	3	2	3 NEMAs
Oakland, CA	405	3	2	3 NEMAs
San Pedro, CA	375	3	2	3 NEMAs
Los Angeles, CA	300	3	2	3 NEMAs
Los Angeles, CA	275	3	2	3 NEMAs
Los Angeles, CA	341	3	2	3 NEMAs
Oakland, CA	261	3	2	3 NEMAs
Los Angeles, CA	237	3	2	3 NEMAs
Oakland, CA	254	3	2	3 NEMAs
Oakland, CA	224	3	2	3 NEMAs
Portland, OR	138	3	2	3 NEMAs
Seattle, WA	226	3	2	3 NEMAs
Mountain View, CA	204	3	2	3 NEMAs
Seattle, WA	178	3	2	3 NEMAs
Seattle, WA	164	3	2	3 NEMAs
Portland, OR	385	3	2	3 NEMAs
Santa Cruz, CA	79	3	3	3 NEMAs
Chicago, IL	275	3	2	3 NEMAs

Property Location	Number of Units	Providers Under Contract	Provider Contracts that include Exclusive Wiring Rights	Type of Contracts
Portland, OR	230	2	1	2 NEMAs
Denver, CO	300	2	2	2 NEMAs
Fort Lauderdale, FL	385	2	2	2 NEMAs
Fort Worth, TX	227	2	2	2 NEMAs
Charleston, SC	221	2	2	2 NEMAs
Henrico, VA	148	2	2	2 NEMAs
Houston, TX	357	2	2	2 NEMAs
Decatur, GA	101	2	2	2 NEMAs
Charlotte, NC	318	2	2	2 NEMAs
Richmond Heights, MO	46	2	2	2 NEMAs
Mountain View, CA	202	2	2	2 NEMAs
Mountain View, CA	192	2	2	2 NEMAs
Atlanta, GA	115	2	2	2 NEMAs
Portland, OR	63	2	1	2 NEMAs
Cibolo, TX	136	2	2	2 NEMAs
Edinburg, TX	128	2	2	2 NEMAs
Cleveland, OH	164	2	2	2 NEMAs
Denver, CO	249	2	2	2 NEMAs
San Antonio, TX	384	2	2	2 NEMAs
Chicago, IL	698	2	2	2 NEMAs
Denver, CO	161	2	2	2 NEMAs
Seattle, WA	119	2	1	2 NEMAs
Portland, OR	196	2	1	2 NEMAs

Property Location	Number of Units	Providers Under Contract	Provider Contracts that include Exclusive Wiring Rights	Type of Contracts
Westminster, CO	320	2	2	2 NEMAs
Hillsboro, OR	324	2	1	2 NEMAs
Long Beach, CA	216	2	2	2 NEMAs
Carlsbad, CA	278	2	2	2 NEMAs
Chicago, IL	148	2	2	2 NEMAs
Escondido, CA	112	2	2	2 NEMAs
Mountain View, CA	583	2	2	2 NEMAs
Petaluma, CA	150	2	2	2 NEMAs
Long Beach, CA	136	2	1	2 NEMAs
Long Beach, CA	49	2	1	2 NEMAs
Long Beach, CA	163	2	1	2 NEMAs
Corona, CA	442	2	2	2 NEMAs
San Jose, CA	299	2	2	2 NEMAs
San Jose, CA	219	2	2	2 NEMAs
Northridge, CA	429	2	2	2 NEMAs
Savannah, GA	275	2	2	2 NEMAs
Nashville, TN	258	2	2	2 NEMAs
Franklin, TN	328	2	2	2 NEMAs
Santa Cruz, CA	94	2	2	2 NEMAs
San Jose, CA	105	2	2	2 NEMAs
Spring, TX	352	2	2	2 NEMAs
Jacksonville, FL	125	2	2	2 NEMAs
Jacksonville, FL	287	2	2	2 NEMAs
Meridian, ID	336	2	2	2 NEMAs
Everett, WA	192	2	2	2 NEMAs
Rocklin, CA	204	2	1	2 NEMAs
Carson, CA	357	2	2	2 NEMAs
Philadelphia, PA	322	2	2	2 NEMAs
Philadelphia, PA	240	2	2	2 NEMAs
Chicago, IL	58	2	2	2 NEMAs
Baltimore, MD	280	2	1	2 NEMAs

Property Location	Number of Units	Providers Under Contract	Provider Contracts that include Exclusive Wiring Rights	Type of Contracts
New York, NY	272	2	2	2 NEMAs
New York, NY	214	2	2	2 NEMAs
New York, NY	646	2	2	2 NEMAs
Hillsboro, OR	352	2	2	2 NEMAs
San Diego, CA	125	2	2	1 EMA 1 Access Only
San Diego, CA	165	2	2	1 EMA 1 Access Only
Washington, DC	264	2	2	1 EMA 1 Access Only
Washington, DC	137	2	2	1 EMA 1 Access Only
Washington, DC	433	2	2	1 EMA 1 Access Only
Washington, DC	112	2	2	1 EMA 1 Access Only
San Diego, CA	295	2	2	1 EMA 1 Access Only
Framingham, MA	196	2	2	1 EMA 1 Access Only
San Francisco, CA	502	2	2	1 EMA 1 Access Only
Upland, CA	44	2	2	1 EMA 1 Access Only
Upland, CA	23	2	2	1 EMA 1 Access Only
Seattle, WA	155	2	1	1 EMA 1 Access Only
Santa Barbara, CA	74	1	1	1 EMA
Edgewood, WA	288	1	1	1 EMA
Gilbert, AZ	360	1	1	1 EMA

Property Location	Number of Units	Providers Under Contract	Provider Contracts that include Exclusive Wiring Rights	Type of Contracts
Kirkland, WA	409	1	1	1 EMA
Lacey, WA	240	1	1	1 EMA
Bremerton, WA	216	1	1	1 EMA
Las Vegas, NV	192	1	1	1 EMA
Shoreline, WA	238	1	1	1 EMA

Total Number of New Build Properties – 112

3 or more providers: 25 properties (22%)
2 providers: 70 properties (63%)
1 provider: 17 properties (15%)

Properties with 2 or more NEMAs: 84 properties (75%)
Properties with 1 EMA: 25 properties (25%)
Access Only agreements: 12 properties = 48% of the 25 EMA properties

APPENDIX B

Table One: Fiber Overbuilds of Existing Properties

(a provider currently serving the property upgrades copper facilities to fiber)

Table Two: New Entrant Overbuilds of Existing Properties

(a provider not currently serving a property builds out facilities to provide service)

(See Attached)

Key

NEMA = Non-Exclusive Marketing Agreement

EMA = Exclusive Marketing Agreement

Access Only = Agreement with no marketing rights for the provider

Table One

2017 AND 2018 Fiber Overbuilds (Existing Properties)

Property Location	Units	Provider	Type of Contract
Charlotte, NC	288	AT&T	Access Only
Charlotte, NC	204	AT&T	Access Only
Houston, TX	148	AT&T	Access Only
Spring, TX	192	AT&T	Access Only
Vacaville, CA	312	AT&T	Access Only
Newport Beach, CA	1306	AT&T	Access Only
San Diego, CA	318	AT&T	Access Only
Aliso Viejo, CA	590	AT&T	Access Only
Aliso Viejo, CA	675	AT&T	Access Only
Miami, FL	254	AT&T	Access Only
Chicago, IL	576	AT&T	Access Only
Haltom City, TX	312	AT&T	EMA
Riverside, CA	586	AT&T	EMA
Folsom, CA	426	AT&T	EMA
Houston, TX	256	AT&T	EMA
Newark, CA	311	AT&T	EMA
Chicago, IL	206	AT&T	EMA
Houston, TX	148	AT&T	EMA
Southgate, MI	488	AT&T	EMA
Southgate, MI	58	AT&T	EMA
Irving, TX	212	AT&T	EMA
Seattle, WA	132	CenturyLink	EMA

Property Location	Units	Provider	Type of Contract
Tempe, AZ	415	CenturyLink	EMA
Dallas, TX	260	AT&T	NEMA
Sacramento, CA	216	AT&T	NEMA
North Olmstead, OH	260	AT&T	NEMA
North Royalton, OH	300	AT&T	NEMA
Noblesville, IL	404	AT&T	NEMA
Chicago, IL	198	AT&T	NEMA
Atlanta, GA	253	AT&T	NEMA
San Jose, CA	941	AT&T	NEMA
Los Angeles, CA	300	AT&T	NEMA
Alpharetta, GA	210	AT&T	NEMA
Los Angeles, CA	345	AT&T	NEMA
Pleasanton, CA	100	AT&T	NEMA
Jacksonville Beach, FL	228	AT&T	NEMA
Dallas, TX	331	AT&T	NEMA
Austin, TX	305	AT&T	NEMA
Dallas, TX	371	AT&T	NEMA
Alpharetta, GA	352	AT&T	NEMA
John's Creek, GA	227	AT&T	NEMA
San Jose, CA	456	AT&T	NEMA
San Diego, CA	160	AT&T	NEMA
San Bruno, CA	437	AT&T	NEMA
Daly City, CA	2983	AT&T	NEMA

Property Location	Units	Provider	Type of Contract
Atlanta, GA	287	AT&T	NEMA
Miami, FL	174	AT&T	NEMA
Villa Park, IL	342	AT&T	NEMA
Woodlands, TX	309	AT&T	NEMA
Dallas, TX	170	AT&T	NEMA
Sunrise, FL	386	AT&T	NEMA
Columbus, OH	420	AT&T	NEMA
Arlington, VA	244	Verizon	NEMA

Total Number of Fiber Overbuild Properties – 53

Total Access Only – 11
Total EMA – 12
Total NEMA – 30

APPENDIX B

Table Two

2017 and 2018 New Entrant Overbuilds (Existing Properties)

*Note this table only includes situations where the provider built out facilities to an existing property to add an additional broadband choice for residents. There are no situations listed below where a provider replaced a service provider who was already serving the property.

Property Location	Units	Provider	Type of Contract
Kirkland, WA	123	WaveG	Access Only
Seattle, WA	238	WaveG	Access Only
Mountain View, CA	373	WaveG	Access Only
Mountain View, CA	120	WaveG	Access Only
Raritan, NJ	224	Verizon	Access Only
Commerce City, CO	120	Comcast	EMA
Boca Raton, FL	95	Comcast	EMA
Glendale, AZ	360	Cox	EMA
Oceanside, CA	284	Cox	EMA
San Francisco, CA	263	WaveG	NEMA
Portland, OR	178	WaveG	NEMA
Portland, OR	185	WaveG	NEMA
Mountain View, CA	203	WaveG	NEMA
Portland, OR	245	WaveG	NEMA
San Marcos, CA	370	Consolidated	NEMA
Santa Ana, CA	300	Consolidated	NEMA
San Diego, CA	100	Consolidated	NEMA
Somerville, IL	184	Starry	NEMA
San Jose, CA	213	Willoweb	NEMA

Total Properties – 19
Total Access Only – 5
Total EMA – 4
Total NEMA - 10

APPENDIX C

Construction Matrix Examples

(Two Examples Attached)

Construction Matrix
(Coaxial Cable Home Runs)
Property Name and Location: [redacted]

Joint Trenching	Owner will perform all joint trenching at Owner's cost			
Demarcation Point Location	IDF Closets on various floors of the Premises			
	Materials	**Installation**	**Ownership**	**Use**
Exterior Conduit **(property line to building(s))**	Owner (includes conduit materials and pull boxes and mule tape/pull string)	Owner	Owner will own all exterior conduit	Operator has non-exclusive use of exterior conduit during Agreement Term
Interior Conduit **(Entrance to building(s) to IDF closet)**	Owner (internal conduit or other pathway materials to be determined by Owner)	Owner	Owner will own all interior conduit	Operator has non-exclusive use of interior conduit during Agreement Term
Equipment (includes distribution cables that extend to demarcation point locations and a vault that Operator will install at the property line of the Premises)	Operator	Operator	Operator will own the Equipment.	Operator has exclusive use of its Equipment during the Agreement Term
Dedicated Home Run Wiring	Operator to provide the following materials to Owner for Owner to install from the demarcation point locations to the wiring panels within each unit: RG 6 cables and RG 11 cables for runs greater than 150 feet	Owner will install (using materials provided by Operator)	Owner will own all Dedicated Home Run Wiring	Operator has exclusive use of the Dedicated Home Run Wiring during the Agreement Term
Cable Home Wiring	Owner will provide and install 1 run of RG6 coaxial cable and 1 run of Category 6 wiring extending from the wiring panels to the wall outlets within each residential unit	Owner	Owner will own all Cable Home Wiring	Operator has non-exclusive use of the Cable Home Wiring during the Agreement Term

Wiring Panels	Owner to provide and install wiring panels within each residential unit. Minimum size will be: 42 inches x 14 inches	Owner	Owner will own all wiring panels	Operator has non-exclusive use of the wiring panels during the Agreement Term. Operator will place its Equipment in an assigned portion of the wiring panels that Owner makes available to Operator.
Electrical	Owner to provide a dual 110 v AC outlet inside or in proximity to the wiring panel in each Dwelling Unit. One of the outlets will be made available to Operator	Owner	Owner	Operator may use the electrical outlet at no cost during the Agreement Term.

Exhibit [redacted]

Construction Matrix (Garden Style/Fiber to the Unit Home Runs)

Property Name and Location: [redacted]

Component	Defined	Materials	Installation	Ownership	REQUIREMENTS
Cable Home Wiring (coaxial cable)	Section 1.b	Owner	Owner	Owner	Owner to install per Spec on Exhibit [redacted]. In connection with the Cable Home Wiring, the Owner will also install connectors at all wall plates.
Internal Fiber Infrastructure	Section 1.c	Company	Company	Owner	The Company will provide and install the Internal Fiber Infrastructure within the Fiber Microduct installed by the Owner. The Company will perform all connections and terminations of the fiber lines within the IDF closets and within the wiring panels in each of the units. As part of this work, the Company will be responsible for installing any and all necessary splitters and coaxial connectors in the wiring panels of each unit.
Fiber Microduct	Section 1.d	Company (12.7 mm microduct with pull string will be provided)	Owner	Owner	Owner to install using materials provided by Company. Once the Fiber Microduct has been installed, Company will install the Internal Fiber Infrastructure and perform the terminations.
Wiring Panels	Section 1.e	Owner	Owner	Owner	Owner to install. Minimum size shall be 30 inches by 14 inches.
Electrical Requirements	Section 1.f	Owner	Owner	Owner	Owner's responsibility per requirements on Exhibit [redacted].

Owner Conduit	Section 1.g	Company (exterior conduit) Owner (interior pathways)	Company (exterior conduit) unless the parties mutually agree that Owner will install the exterior conduit instead of the Company. Owner (interior pathways)	Company (exterior conduit) Owner (interior pathways)	Company will provide and install conduit in the joint trench at the Premises unless there is mutual agreement of the parties (at least two (2) weeks in advance of the Company's planned installation of such conduit) that the Owner will instead perform the installation of the exterior conduit using the materials provided by the Company. All conduit provided by the Company will be a component of the Company Wiring during the term of the Agreement regardless of which party installs it. The Owner will be responsible for the joint trench and for conduits or some other mutually approved pathways as necessary for the Company to extend the Company Wiring within the buildings
Company Wiring	Section 2	Company	Company	Company	Company to install per approved Plans. The Company Wiring will include any vaults required for the provision of Services to the Premises.

EXHIBIT F
Declaration of Jason Knutsen

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Competitive Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF AMLI MANAGEMENT COMPANY IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Jason Knutsen, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as VP, IT Infrastructure for AMLI Management Company ("AMLI"), the 43rd largest apartment owner in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/

3. I have served as VP, IT Infrastructure since 2014. I have over 5 years of experience in the delivery of video, broadband, and other communications services in multitenant environments and over 20 years' experience in the delivery of internet and broadband in the commercial environment. In my role at AMLI, I am responsible for telecom and broadband agreements, IT Operations, & Cybersecurity.

4. AMLI currently owns and operates a total of 70 apartment communities, comprising 24,000 units, located in 7 states.

The Residential Real Estate Industry Is Highly Competitive.

5. Like other owners of apartment properties, AMLI is keenly aware of the importance of ensuring that residents have access both to broadband internet access service and to a competitive choice of providers. The option to choose their vendor is very important to many residents of our apartment communities. Younger residents tend to want the high bandwidth data packages while older residents still prefer video, data and voice bundle options. Residents demand access and expect a choice. Furthermore, our residents have other options in deciding where to live. If we cannot fulfill resident needs, they can and will move; this turnover reduces occupancy rates, which in turn reduces the income we receive from a property. In short, AMLI has a very strong incentive to ensure that each of our properties is served by multiple providers that provide reliable, high quality, and high speed broadband service.

6. That is why the typical AMLI community has at least two broadband vendors available to residents in markets where such competition exists. These vendors typically include the local franchised cable operator, the local telephone company's broadband product, and sometimes a third independent internet service providers (ISPs"). In fact 81.4 % of our communities have two broadband vendors available, and 5.7 % have three or more.

7. Generally speaking, we will essentially always have service at our properties from the franchised cable multiple system operator ("MSO"). Those companies have such a large and heavily advertised presence in the market and have such ubiquitous networks that they

are generally prepared to serve all of our buildings, and residents expect to have their service as an option.

8. Residents also typically are very much aware of the existence of broadband service from the local exchange carrier and where such service is available we need to offer that option to meet resident demand as well. In most cases we are able to accommodate that demand, but it is not unusual for CenturyLink or AT&T to refuse to extend broadband service to a building or refuse to upgrade their existing copper facilities to fiber so that higher speed broadband service is available to the residents. In 2019, I approached AT&T to upgrade service and are renew a non-exclusive marketing agreement for the AMLI Evanston property located in Evanston, IL. AT&T currently services the building along with Comcast. AT&T has limited speeds and services the building via older copper wiring. AMLI desired that AT&T upgrade their facilities and back hual to bring fiber into the building, but AT&T declined to upgrade their network.

9. The newer competitive ISPs are a good alternative but their service is typically only available within their footprints where they have deployed fiber. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their fiber footprints, ISPs often will only serve selected properties that they determine can meet their internal rate-of-return requirements. AMLI is open to service from such providers, both fixed wireless and fiber-optic-based, and we have entered into agreements with Wave G, Bel Air Internet, & GigaMonster to serve some of our communities. There have been instances, however, when we have had discussions with such a provider and the provider ultimately chose not to serve our property. The providers we have chosen to work do not limit the amount of competition that we can bring in; however other providers that we have nto

reached agreement with desired restrictions on the number of competitors we could bring into properties, restricted it to one other provider.

10. Our business is not to sell broadband service, or to make space available to broadband providers. Our business is to provide residents with attractive places to live. Furthermore, AMLI is not the only choice for residents of any of the communities in which our properties are located: There are other apartment owners in those communities who are trying to attract the same individuals and families to their properties. High quality, reliable broadband service is a capability we must offer if we are to succeed in competing with those other owners, and if we do not keep up with or do better than those other owners, we will not be successful. This competition, which our property managers are engaged in every single day, is the most important facet of our business and drives all of our decisions.

11. The terms and conditions of our agreements with providers depend on their needs and policies. AMLI is not in a position to demand that any particular provider serve any of our communities. In fact, because the providers know that it is essential for AMLI to be able to offer our residents access to their services, they have considerable bargaining power.

Agreements for Service to Existing Buildings.

12. In the case of service to an existing property from the local cable franchisee, AMLI typically enters into agreements in which we make available the existing cable home run wiring (this is typically coaxial cable, but sometimes it is fiber optic cable) on an exclusive basis. For historical reasons going back many years, it is very rare for a cable operator to own the wiring inside an existing property. Instead, the MSO will contract with us to use Owner-owned home run wiring on an exclusive basis. In exchange for such exclusivity, the MSO will agree in

the contract to be responsible for all maintenance and repair of the home-run wiring. This makes sense because service providers such as MSOs have skilled and trained technicians who are far more qualified and competent to maintain and repair broadband wiring than our own maintenance personnel. This provides a tremendous benefit for our residents who experience fewer and shorter service issues related to faulty wiring than situations where no one party has clear repair and maintenance obligations. The terms and conditions of the MSO's use of our home-run wiring factor into the financial consideration paid by the MSO under our service contracts. One component of this compensation typically takes the form of a "door fee," which is a one-time payment equal to a negotiated amount for each apartment unit. Door fees can range from roughly $ [0] to $ [100].

13. So-called "sale and leaseback" agreements are very rare. Most of the national cable operators assume that the property owner owns all of the existing wiring inside an apartment building, for legal and practical reasons. None of our contracts with MSOs that I am familiar with contain a "sale and leaseback" provision at all. The contracts just state with clarity that the Owner owns the inside wiring. It is often impossible to determine who paid for or holds title to wiring that was installed many years in the past. Without documentation, the law in most states considers existing wiring to be a fixture and thus the property of the building owner. Furthermore, the FCC's inside wiring rules require cable operators to take certain steps to preserve any ownership interests they may have in inside wring and in practice this is rarely done. Consequently, to the best of my knowledge, AMLI has not entered into any "sale-and-leaseback" agreements.

14. AT&T, routinely insists on installing and retaining title to their own fiber home run wiring. This is not a point they are willing to negotiate. In other words, they own all the

fiber in a building from the minimum point of entry of the building, up to each apartment unit. By owning the internal fiber home-run they retain control over it and prevent its use by others. Once these carriers have installed the fiber to the units, they connect their fiber to a wiring panel that is our responsibility to install, which interconnects with the wiring inside the unit. These providers do not enter into exclusive wiring agreements, because they are not using any of our wiring to get to the units. As a practical matter, their policies result in de-facto exclusive wiring arrangements and put them in the same position as the cable MSOs: both sets of companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each unit. The cable MSOs negotiates for the exclusive right to use wiring we own and the MSOs agree to maintain that wiring, while the telecommunications carriers bear the cost of installing their own fiber over which they have exclusive control and which they also agree to maintain. From a financial perspective, these two positions are roughly comparable as far as we are concerned.

15. Competitive ISPs also typically will install their own fiber from the minimum point of entry to each unit or to an intermediary utility closet ("IDF"). The ISPs cannot use telecommunications carrier-owned fiber because it is owned by each carrier and we have no rights to let the ISP use that fiber. When an ISP installs fiber to each unit, there is no need for the ISP to connect to any Owner-owned wiring except for the wiring inside the unit. However, when the ISP extends its fiber only to the IDF closet, there must be some Owner-owned wiring available for the ISP to run its signals from the IDF closets to the units. Often ISPs can use Category 6 or Category 5(e) wiring to carry their signals to the units **if** such wiring exists at the Property. In principle, AMLI has no objection to allowing such providers to use any such wiring that we own, but in practice that wiring just may not exist. If a local exchange carrier

owns its own fiber all the way to the unit and if the incumbent MSO uses coaxial cable to deliver its services to the units, there simply may not be any wiring available for the ISP.

16. Many of the competitive ISPs that we work with prefer to install and own their own home run fiber all the way to the units for the same reasons as the telecommunications carriers. It is very difficult for any provider to deliver reliable service over a network if other entities have the right to disconnect and use the home run wiring on a unit-by-unit basis.

17. AMLI enters into marketing agreements with all types of providers. We do not require it as a condition of granting access to a property. In a typical marketing agreement, we agree to do the following things: Distribute marketing materials to residents and allow and coordinate access for on-site marketing events. In return for assisting with marketing their service, the providers will typically pay some type of compensation to us. Often this compensation is a percentage of the provider's recurring revenue it collects from its subscribers at the building. The percentage of revenue shared increases as the provider's penetration rate increases. The revenue share in the contract can range from zero to 8 or 10%, depending on the provider's penetration in the building; in reality, however, the amount we actually receive typically falls in the range of three to six percent, because the higher penetrations required for the provider to pay the higher percentages are not reached. The amount of compensation providers have been willing to pay has gone down over time, and although the amount of the revenue share is negotiable, the maximum amount they will pay depends largely on their internal policies, rather than on our negotiation demands.

18. AMLI seeks to enter non-exclusive marketing arrangements with multiple providers at a single property whenever possible. We strive to make a choice of broadband providers available to residents and we want our on-site staff to be able to market each provider's

services so that residents can choose a service from the provider of their choice that meets their needs and budgets. Thus, whenever possible we try to enter only non-exclusive marketing arrangements. Even though the financial offers from service providers are far less rewarding for non-exclusive marketing agreement than exclusive marketing offers, our higher priority is letting our residents know that there is a choice of broadband providers available. In fact 85.7% of our communities have **only** non-exclusive marketing contracts in place while only 14.3 % have an exclusive marketing contract .

19. AMLI owns or manages some apartment properties in which one provider has exclusive marketing rights. However, as noted in the tables below, at many of our properties where one provider has exclusive marketing rights other providers are still serving our residents either without a contract or in some cases with a contract that does not include marketing rights (an "access only" contract). Residents are very much aware of which entities are offering services in the community at large because they are exposed to many forms of advertising and marketing in all forms of media. While our exclusive marketing agreements grant certain rights to the respective providers, they do not prohibit on-site staff from answering questions from residents about the availability of other services. Consequently, it is not difficult for residents to learn whether there is a competitive alternative in their building.

20. Our on-site staff is aware of the differences between exclusive access agreements and exclusive marketing agreements, and they know which providers are permitted to serve their properties. On-site property managers, however, do not have the authority to grant or deny access to providers or enter into agreements with providers. Nevertheless, it is common for provider representatives to contact property managers and attempt to gain access or make claims of various kinds regarding the rights of the provider. Such communications should be made to

the appropriate owner representatives, yet providers continue to rely on untrained personnel who contact the wrong people and are then surprised when they fail to get satisfactory answers.

Agreements for Installing Service in New Buildings.

21. Agreements for installing facilities in new buildings take the same basic forms described above, except that, because there is no existing wiring in the building, part of the negotiation between AMLI and the cable MSO will typically involve which party will bear the cost of providing and installing the home run wiring that will be used by the MSO. If AMLI assumes some or all of the cost, that cost is often offset in part by the compensation the MSO will pay under the service contract. Regardless of which party actually provides and installs the home run wiring, title to that wiring will be held by the property owner. With AT&T, this negotiation does not occur as AT&T routinely insists on installing, owning and exercising exclusive control over their own fiber home run lines that extend to each unit.

22. For the most part, providers prefer to use their own technicians or contractors for the installation of their facilities, rather than having our contractors do the work. In new construction, we often install microduct provided by the cable MSO, and their contractor will later install the wiring or fiber optic cable within the microduct. On the other hand, Verizon and AT&T typically want to install both the microduct and the fiber that is housed within the microduct. One reason we sometimes prefer the MSO approach is that if we can control the timing of installation of the microduct, we have fewer concerns that construction of the entire building may be delayed while we wait for the provider (like AT&T and Verizon) to do the work.

Types of Agreements in Our Portfolio.

23. The following table describes in detail the types of providers and agreements that AMLI currently has in place at all of its communities, excluding properties at which broadband service is available on a bulk basis:

Table 1: Types of Agreements in All Apartment Properties Owned or Managed by AMLI

	Number of Properties	Percentage of Portfolio	Number of Properties	Percentage of Portfolio
Properties with one broadband provider	9	12.9%		
Exclusive wiring rights			9	12.9%
Use of owner wiring			0	
Use of provider wiring			9	12.9%
Exclusive marketing rights			9	12.9%
Properties with two broadband providers	57	81.4%		
Exclusive wiring rights			57	81.4%
Use of owner wiring				
Use of provider wiring			57	81.4%
Exclusive marketing rights			1	1.4%
Properties with more than two broadband providers	4	5.7%		
Exclusive wiring rights			4	5.7%
Use of owner wiring				
Use of provider wiring			4	5.7%
Exclusive marketing rights			0	0.0%
TOTAL number of properties	70	100		

24. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 29th day of August, 2019, at Chicago, IL.

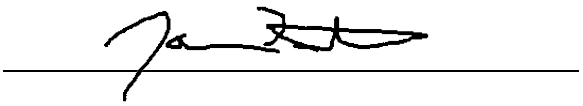


EXHIBIT G
Declaration of Andrew Smith

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF ANDREW SMITH IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Andrew Smith, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as President for Ancillary Services Management, LLC ("ASM"), a owner-centric consulting firm dedicated to managing and negotiating ancillary service agreements (including, but not limited to, voice, video and data agreements) for apartment owners, developers and managers who are our clients.

3. I have served as President of ASM since 2002. I have previously served in comparable positions since 1998, and I have over 21 years of experience in the delivery of video, broadband, and other communications services in multitenant environments. In this position, I am responsible for locating new services and service providers, negotiating agreements with the service providers, and managing new and existing telecom agreements for residential properties owned or managed by our real estate clients.

4. ASM currently oversees a total of 626 apartment communities, comprising 110,229 units, located in 26 states plus the District of Columbia.

The Residential Real Estate Industry Is Highly Competitive.

5. As a representative and negotiating agent for numerous owners, developers and managers of apartment properties, ASM is emphasizes the importance of ensuring that residents of our clients' properties have access both to broadband internet access service and to a competitive choice of providers. If ASM cannot help our clients address resident needs, those residents can and will move to other properties; this turnover reduces occupancy rates at our clients' properties, which in turn reduces the rental income our clients receive. This inability to address resident needs would likely lead to our clients looking for an alternative consultant or agent who could more successfully address resident needs and improve occupancy. In short, ASM has a very strong incentive to ensure that each of our client's properties are served by multiple providers that provide reliable, high quality, and high speed broadband service.

6. That is why ASM aggressively promotes having at least two broadband vendors on each community available to residents in markets where such competition exists. These vendors typically include the local franchised cable operator, the local telephone company's broadband product, and occasionally one or more independent internet service providers (ISPs"). While we are largely successful in being able to bring choice to residents or our client's communities, we have encountered roadblocks where providers are simply not interested in serving certain communities. The predominant reasons providers tell ASM they are not interested in some communities are related to costs or concerns about the provider's return on investment as explained further herein.

The table below summarizes the properties for which ASM has negotiated one or more broadband agreements between January 1, 2017 and the current date and sets forth the number of service providers at these properties.

TOTAL PROPERTIES WORKED BY ASM FROM JANUARY 1, 2017 TO PRESENT		
	Number of Total Properties	Percentage of Total Properties
Properties with one broadband provider	4	3%
Properties with two broadband providers**	108	81.2%
Properties with more than two broadband providers	21	15.8%
TOTAL	133 total properties	100%

** In this category, I have included any service provider who serves a property even if the provider is capable of only delivering Digital Subscriber Line (DSL) service. This includes properties where the telephone company has not retired its copper facilities and upgraded to fiber. While DSL is considered a broadband service, ASM is not sure if the speeds provided at some of the "copper" properties truly meet the parameters of a "broadband" service.

For new builds, the number of service providers per property are even higher. ASM's clients realize that a property cannot survive in today's market without opening with a choice of broadband services for our residents. The table on the following page summarizes the new build projects for which ASM has negotiated one or more broadband agreements between January 1, 2017 and the current date and sets forth the number of service providers at these new build projects.

TOTAL NEW BUILD PROJECTS WORKED BY ASM FROM JANUARY 1, 2017 TO PRESENT		
	Number of New Builds	Percentage of Total New Builds
Properties with one broadband provider**	1	12.5%
Properties with two broadband providers	4	50%
Properties with more than two broadband providers	3	37.5%
TOTAL	8 New Build Projects	100%

** It is highly unusual for ASM to negotiate an exclusive marketing contract for a new build project. In this instance, ASM's client is likely to convert this exclusive marketing contract to a bulk billing arrangement before this project opens. ASM was up front about our client's intentions when discussing this property with multiple service providers. When the providers learned of the likelihood of converting to bulk service with a single particular provider, the other providers were no longer interested in moving forward with deployment at their expense.

7. Generally speaking, we will essentially always make arrangements for service at our clients' properties from the franchised cable multiple system operator ("MSO"). Those companies have such a large and heavily advertised presence in the market and have such ubiquitous networks that they are generally prepared to serve all of our clients' properties, and residents expect to have their service as an option.

8. Residents also typically are very much aware of the existence of broadband service from the local exchange carrier and where such service is available we need to offer that option to meet resident demand as well. In most cases we are able to accommodate that demand, but it is not unusual for Verizon to refuse to extend broadband service to a new construction property and it is common for Verizon and AT&T to refuse to upgrade their existing copper

facilities to fiber which would enable residents to receive higher speed broadband service from those providers. This can be exasperating and keeps certain properties stuck with lower speed DSL service. Very recently, I reached out to Verizon to inquire about the possibility of Verizon upgrading two existing copper properties in Richmond, Virginia to a fiber-to-the-unit deployment which would result in Verizon's high-speed broadband service becoming available to the hundreds of residents who live in those two communities who currently can only receive Verizon's DSL service. Verizon's response was less than enthusiastic. I have attached a redacted version of this e-mail exchange as Attachment A to this declaration. Verizon's response indicated they were not interested in bringing their high-speed FiOS service because the properties were in "discretionary" areas where Verizon "was not obligated" to deploy FiOS. Verizon did indicate that they might be interested but only if my client was interested in doing a bulk agreement with Verizon. After receiving Verizon's response, I contacted DISH Fiber (a division of DISH Networks) and asked them if they might be interested in building out its facilities so that residents would have another choice of service providers. DISH's response was practically identical to Verizon's. DISH said they are "100% bulk" and would not serve the two Richmond properties under any other scenario. My client is not interested in entering a bulk contract - which is absolutely **not** the way to achieve the client's goal of expanding the number of broadband choice available to residents. This is not an unusual occurrence. In my experience, providers are often not interested in deploying services unless the owner is willing to enter a bulk agreement. There are repeated examples where I have reached out to Verizon only to see Verizon pick and choose which properties they would be willing to upgrade. In another recent example, I contacted Verizon about delivering FiOS to another client's portfolio located in various Verizon territories in Maryland, Delaware and Pennsylvania. Out of more

than two dozen communities that Verizon currently services with copper facilities and DSL service, Verizon was only was only interested in upgrading to fiber at 4 of them. ASM is currently working on agreements to upgrade those four communities, however, Verizon has informed me that it needs to prioritize their funds for upgrading communities, so they have warned me that it could take two to three years before those 4 communities will actually see the fiber overbuild occur and the upgraded services become available for residents.

9. The newer competitive ISPs are a good alternative but their service is typically only available within their footprints where they have deployed fiber. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their fiber footprints, ISPs often will only serve selected properties that they determine can meet their internal rate-of-return requirements. All ASM clients are open to service from such providers, both fixed wireless and fiber-optic-based, and we are evaluating and in discussions with Dish Fiber and Starry to name a few companies to serve some of our communities. There have been instances, however, when we have had discussions with such a provider but we ultimately did not move forward because the ISP required a bulk service agreement as a requirement for the ISP to make the investment and deploy its services. As with the situation we experienced with Verizon in Richmond, this client's goal was also to increase the number of broadband choices available to residents – not to lock the property into a long-term bulk contract. This is a common scenario with many providers: They simply are not interested in deploying new services (or upgrading current services) to a community unless they can secure a bulk contract with the owner of the building. When service providers adopt those type of negotiating positions, it makes it very difficult for property owners to increase the number of broadband choices available to residents at their properties.

10. Our business is to help our clients evaluate what services and service providers will meet their residents needs now and into the future and to make sure that our clients' communities are able to attract and retain residents, as our clients' communities are certainly not the only choice of housing for residents. There are other apartment owners in those communities who are trying to attract the same individuals and families to their properties. High quality, reliable broadband service must be available if our clients are to succeed in competing with those other owners, and if ASM cannot help our clients compete with those other owners, we will not be successful and our clients will look for another consultant that can make them successful. This competition, which we are engaged in every single day, is the most important facet of our business and drives all of our decisions.

Agreements for Service to Existing Buildings.

11. In the case of service to an existing property from the local cable franchisee, ASM's clients typically enters into agreements in which we make available the existing cable home run wiring (this is typically coaxial cable, but sometimes it is fiber optic cable) on an exclusive basis. For historical reasons going back many years, it is very rare for a cable operator to own the wiring inside an existing property. Instead, the MSO will contract with the owner to use Owner-owned home run wiring on an exclusive basis. In exchange for such exclusivity, the MSO will agree in the contract to be responsible for all maintenance and repair of the home-run wiring. This makes sense because service providers such as MSOs have skilled and trained technicians who are far more qualified and competent to maintain and repair broadband wiring than our clients maintenance personnel. This provides a tremendous benefit for our residents who experience fewer service issues related to faulty wiring than situations where no one party

has clear repair and maintenance obligations. The terms and conditions of the MSO's use of our home-run wiring factor into the financial consideration paid by the MSO under the service contracts we negotiate. One component of this compensation typically takes the form of a "door fee," which is a one-time payment equal to a negotiated amount for each apartment unit. Door fees can range from roughly $ 25 to $ $200.

12. The two largest national telecommunications companies that offer fiber-based broadband service, Verizon and AT&T, routinely insist on installing and retaining title to their own fiber home run wiring. This is not a point they are willing to negotiate. In other words, they own all the fiber in a building from the minimum point of entry of the building, up to each apartment unit. By owning the internal fiber home-run they retain control over it and prevent its use by others. Once these carriers have installed the fiber to the units, they connect their fiber to a wiring panel that is the property owners responsibility to install, which interconnects with the wiring inside the unit. These providers do not enter into exclusive wiring agreements, because they are not using any of the property wiring to get to the units. As a practical matter, their policies result in de-facto exclusive wiring arrangements and put them in the same position as the cable MSOs: both sets of companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each unit. The cable MSOs negotiates for the exclusive right to use wiring we own and the MSOs agree to maintain that wiring, while the telecommunications carriers bear the cost of installing their own fiber over which they have exclusive control and which they also agree to maintain. From a financial perspective, these two positions are roughly comparable as far as we are concerned.

13. Competitive ISPs also typically will install their own fiber from the minimum point of entry to each unit or to an intermediary utility closet ("IDF"). The ISPs cannot use

telecommunications carrier-owned fiber because it is owned by each carrier and we/our owners have no rights to let the ISP use that fiber. When an ISP installs fiber to each unit, there is no need for the ISP to connect to any Owner-owned wiring except for the wiring inside the unit. However, when the ISP extends its fiber only to the IDF closet, there must be some Owner-owned wiring available for the ISP to run its signals from the IDF closets to the units. Often ISPs can use Category 6 or Category 5(e) wiring to carry their signals to the units **if** such wiring exists at the Property. In principle, ASM and its clients have no objection to allowing such providers to use any such wiring that we own, but in practice that wiring just may not exist. If a local exchange carrier owns its own fiber all the way to the unit and if the incumbent MSO uses coaxial cable to deliver its services to the units, there simply may not be any wiring available for the ISP.

14. ASM negotiates marketing agreements with all types of providers. We do not require it as a condition of granting access to a property. In return for assisting with marketing their service, the providers will typically pay some type of compensation to the property owner . Often this compensation is a percentage of the provider's recurring revenue it collects from its subscribers at the building. The percentage of revenue shared increases as the provider's penetration rate increases. The revenue share in the contract can range from zero to 8 or 10%, depending on the provider's penetration in the building; in reality, however, the amount our clients actually receive typically falls in the range of three to six percent, because the higher penetrations required for the provider to pay the higher percentages are not reached due to the residents having a choice of providers to order service from. The amount of compensation providers have been willing to pay has gone down over time, and although the amount of the

revenue share is negotiable, the maximum amount they will pay depends largely on their internal policies, rather than on our negotiation demands.

15. ASM recommends to its clients that they seek to enter non-exclusive marketing arrangements with multiple providers at a single property whenever possible. We strive to make a choice of broadband providers available to residents and we want our clients property site staff to be able to market each provider's services so that residents can choose a service from the provider of their choice that meets their needs and budgets. Thus, whenever possible we try to enter only non-exclusive marketing arrangements. Even though the financial offers from service providers are far less rewarding for non-exclusive marketing agreement than exclusive marketing offers, our higher priority is letting our residents know that there is a choice of broadband providers available.

16. Several of ASM's clients own or manage some apartment properties in which one provider has exclusive marketing rights. However, the existence of exclusive marketing contracts at our client's properties has not been a detriment to other providers performing installations and upgrades to deliver competitive services. In fact, ASM has 62 existing properties in our portfolio of client assets where the MSO has an exclusive marketing agreement but Verizon has agreed to deploy fiber to the unit and offer competitive services pursuant to a contract that did not grant Verizon any marketing rights (an "access only" contract). The exclusive marketing rights held by the MSOs did not deter Verizon from making the fiber investment at these 62 properties. In fact, in ASM's experience the contracts that an Owner has put in place with existing providers at a property are not a reason cited by Verizon for the many times they inform us that they have elected **not** to deploy fiber at a property. The more common reasons we receive from Verizon for not deploying fiber to a particular property are:

the location of the property; the costs of the fiber deployment or upgrade at the property; the type of property it is (such as a mobile home community); or, as in the case of the two Richmond communities cited above in paragraph 8, a willingness by Verizon to serve a property only under a bulk billing arrangement.

17. Our clients on-site staff is aware of the differences between exclusive access agreements and exclusive marketing agreements, and they know which providers are permitted to serve their properties. On-site property managers, however, do not have the authority to grant or deny access to providers or enter into agreements with providers. Nevertheless, it is common for provider representatives to contact property managers and attempt to gain access or make claims of various kinds regarding the rights of the provider. Such communications should be made to the appropriate owner representatives, yet providers continue to rely on untrained personnel who contact the wrong people and are then surprised when they fail to get satisfactory answers.

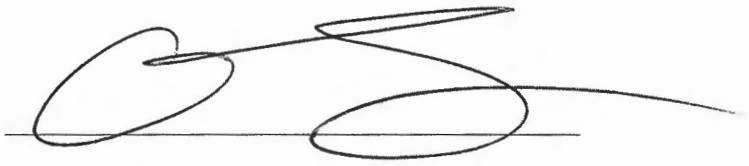
Agreements for Installing Service in New Buildings.

18. Agreements for installing facilities in new buildings take the same basic forms described above, except that, because there is no existing wiring in the building, part of the negotiation between ASM on behalf of our clients and the cable MSO will typically involve which party will bear the cost of providing and installing the home run wiring that will be used by the MSO. If one of our clients assumes some or all of the cost, that cost is often offset in part by the compensation the MSO will pay under the service contract. Regardless of which party actually provides and installs the home run wiring, title to that wiring will be held by the property owner. With AT&T and Verizon, this negotiation does not occur as both Verizon and

AT&T routinely insist on installing, owning and exercising exclusive control over their own fiber home run lines that extend to each unit.

19. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 29th day of August, 2019, at Fairfax Station, Virginia



Andrew Smith

ATTACHMENT A

(E-MAIL EXCHANGE DATED BETWEEN ASM AND VERIZON: REDACTED)

See Attached

From: [redacted] [mailto:[redacted]@verizon.com]
Sent: Tuesday, August 27, 2019 10:20 AM
To: Andrew Smith
Subject: Re: [E] Looking for copies of agreements/ possibly doing new deals.

Andrew,

Fios is not deployed at either of these properties. In addition, they are both in "Discretionary" areas, meaning that we are not obligated by the franchise agreement to deploy Fios there. Although we sometimes do, especially for bulk agreements and sometimes for green-fields.

[redacted]
Business Development Manager
Verizon Enhanced Communities
Verizon Consumer Group

On Mon, Aug 26, 2019 at 11:24 AM Andrew Smith <> wrote:

[redacted],

Our client [redacted] recently picked up these 2 communities and I am trying to get copies of any agreements/PAL's they may have with Verizon.

Property Name	Total Units	Address	City	State	Zip
[redacted]	192	[redacted]	Richmond	VA	23223
[redacted]	156	[redacted]	Richmond	VA	23227

Can you please send me what you have?

If there are opportunities for new agreements – I am interested in that as well.

Thanks!

Andrew Smith

President

Ancillary Services Management

EXHIBIT H
Declaration of Kimberly Smith

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF KIMBERLY SMITH IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Kimberly Smith, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as the National Director of Ancillary Services for Windsor Property Management Company ("Windsor"), the vertically-integrated property management company of GID, the 33rd largest apartment owner in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/. Windsor and GID are herein collectively referred to as "GID/Windsor."

3. I have served as National Director of Ancillary Services since 2002. I have previously served in comparable positions, and I have over 23 years of experience in the delivery of video, broadband, and other communications services in multitenant environments. In this

position, I am responsible for the research, development and implementation of programs, products and services that enhance the experience of our residents. I negotiate all potential multifamily ancillary contracts, including, but not limited to, contracts for cable, local telephone, long distance telephone and high-speed internet services, and I review all ancillary contracts during the due diligence process for acquisitions of new assets.

4. GID/Windsor currently operates/manages a total of 103 apartment communities, comprising 29,107 residential units, located in 13 states.

The Residential Real Estate Industry Is Highly Competitive.

5. Like other owners of apartment properties, GID/Windsor is keenly aware of the importance of ensuring that residents have access both to broadband internet access service and to a competitive choice of providers. The option to choose their vendor is very important to many residents of our apartment communities. Our more tech-savvy residents tend to want the high bandwidth data packages while other residents still prefer video, data and voice bundle options. Residents demand access and expect a choice. Furthermore, our residents have other options in deciding where to live. On a national basis, approximately 48% of apartment residents move every year, and reducing resident turnover is a major concern for our property managers. If we cannot meet resident needs, they can and will move; this turnover reduces occupancy rates, which in turn reduces the income we receive from a property. In short, GID/Windsor has a very strong incentive to ensure that each of our properties is served by multiple providers that provide reliable, high quality, and high speed broadband service.

6. That is why the typical GID/Windsor community has at least two broadband vendors available to residents in markets where such competition exists. These vendors typically include the local franchised cable operator, the local telephone company's broadband product

(where available), and often one or more independent internet service providers (ISPs"). In fact approximately 98% of our communities have at least two broadband vendors available, and nearly 15% have three or more. However, as discussed below, some of our communities are hampered with outdated service because the local telephone company has not retired its copper facilities and replaced them with fiber facilities that deliver faster speeds and more robust services.

7. Generally speaking, we will essentially always have service at our properties from the franchised cable multiple system operator ("MSO"). Those companies have such a large and heavily advertised presence in the market and have such ubiquitous networks that they are generally prepared to serve all of our buildings, and residents expect to have their service as an option.

8. The newer competitive ISPs are a good alternative but their service is typically only available within their footprints where they have deployed fiber. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their fiber footprints, ISPs often will only serve selected properties that they determine can meet their internal rate-of-return requirements. GID/Windsor is open to service from such providers, both fixed wireless and fiber-optic-based, and we have entered into agreements with Wave G, Google Fiber, Gigamonster and Broadband Holdings to serve some of our communities. There have been instances, however, when we have had discussions with such a provider and the provider ultimately has been unable to deliver service to one or more of our properties as discussed in paragraph 14 below.

9. Our business is not to sell broadband service, or to make space available to broadband providers. Our business is to provide residents with attractive places to live.

Furthermore, GID/Windsor is not the only choice for residents of any of the communities in which our properties are located. There are other apartment owners in those communities who are trying to attract the same individuals and families to their properties. High quality, reliable broadband service is a capability we must offer if we are to succeed in competing with those other owners, and if we do not keep up with or do better than those other owners, we will not be successful. This competition, which our property managers are engaged in every single day, is the most important facet of our business and drives all of our decisions.

10. The terms and conditions of our agreements with providers depend on their needs and policies. GID/Windsor is not in a position to demand that any particular provider serve any of our communities. In fact, because the providers know that it is essential for GID/Windsor to be able to offer our residents access to their services, they have considerable bargaining power.

Agreements for Service to Existing Buildings.

11. In the case of service to an existing property from the local cable franchisee, GID/Windsor typically enters into agreements in which we make available the existing cable home run wiring (this is typically coaxial cable, but sometimes it is fiber optic cable) on an exclusive basis. For historical reasons going back many years, it is very rare for a cable operator to own the wiring inside an existing property. Instead, the MSO will contract with us to use Owner-owned home run wiring on an exclusive basis. In exchange for such exclusivity, the MSO will agree in the contract to be responsible for all maintenance and repair of the home-run wiring. This makes sense because service providers such as MSOs have skilled and trained technicians who are far more qualified and competent to maintain and repair broadband wiring than our own maintenance personnel. This provides a tremendous benefit for our residents who

experience fewer service issues related to faulty wiring than situations where no one party has clear repair and maintenance obligations. The terms and conditions of the MSO's use of our home-run wiring factor into the financial consideration paid by the MSO under our service contracts. One component of this compensation typically takes the form of a "door fee," which is a one-time payment equal to a negotiated amount for each apartment unit. Door fees can range from roughly $50 to $250 per unit.

12. So-called "sale and leaseback" agreements are very rare. Most of the national cable operators assume that the property owner owns all of the existing wiring inside an apartment building, for legal and practical reasons. Thus, most of our contracts with MSOs contain no "sale and leaseback" provision at all. The contracts just state with clarity that the Owner owns the inside wiring but there is no language in the contract that "sells" the wiring to us. Consequently, to the best of my knowledge, GID/Windsor has not entered into any "sale-and-leaseback" agreements.

13. The two largest national telecommunications companies that offer fiber-based broadband service, Verizon and AT&T, routinely insist on installing and retaining title to their own fiber home run wiring. In our experience, this is not a point they are willing to negotiate. In other words, they own all the fiber in a building from the minimum point of entry of the building, up to each apartment unit. By owning the internal fiber home-run they retain control over it and prevent its use by others. Once these carriers have installed the fiber to the units, they connect their fiber to a wiring panel that is our responsibility to install, which interconnects with the wiring inside the unit. These providers do not enter into exclusive wiring agreements, because they are not using any of our wiring to get to the units. As a practical matter, their policies result in de-facto exclusive wiring arrangements and put them in the same position as the cable MSOs:

both sets of companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each unit. The cable MSOs negotiate for the exclusive right to use wiring we own and the MSOs agree to maintain that wiring, while the telecommunications carriers bear the cost of installing their own fiber over which they have exclusive control and which they also agree to maintain. From a financial perspective, these two positions are roughly comparable as far as we are concerned.

14. Competitive ISPs also typically will install their own fiber from the minimum point of entry to each unit or to one or more intermediary utility closets (each, an "IDF"). In our experience, most ISPs prefer to extend their fiber lines to the IDF locations where they then look to connect to Owner-owned wiring that extends from the IDFs to the individual residential units. The ISPs cannot use telecommunications carrier-owned fiber or wiring that extends to the units because such fiber or wiring is owned by each carrier and we have no rights to let the ISP use that fiber or wiring. Often ISPs will use Owner-owned Category 6 or Category 5(e) wiring to carry their signals to the units **if** such wiring exists at the Property. In principle, GID/Windsor has no objection to allowing such providers to use any such wiring that we own, and we have entered a number of contracts with ISPs (like Wave G) that allows the ISP to connect to our Category 6 or Category 5(e) wiring in the IDF closets. However at some properties, that type of Owner-owned wiring simply just does not exist. Currently, GID/Windsor is working with an ISP that has the ability to serve existing properties we own in several key markets. As part of our ongoing efforts to bring more broadband choice to residents, we have been working with this particular ISP to identify specific properties where the ISP could build-out its fiber facilities to provide this competitive broadband choice for our residents. However this ISP does not want to extend fiber all the way to the units, which limits our deployment options as the ISP is relying on

the availability of existing Owner-owned wiring at our properties. As a result we have hit some roadblocks on deploying this ISP at properties where there is no Owner-owned Category 6 or Category 5(e) wiring available for the ISP's use because either: (a) the incumbent telephone company owns such Category 6 or Category 5(e) wiring (this is common at some of our older properties where the incumbent telephone company has not yet retired its copper facilities and where the copper demarcation point is at or near the residential units), or (b) the incumbent telephone company owns fiber lines that extend all the way to the units so no Category 6 or Category 5(e) wiring was ever installed (this is common at some newer properties where the telephone company installed the units from the outset).

15. GID/Windsor enters into marketing agreements with all types of providers. We do not require it as a condition of granting access to a property. In a typical marketing agreement, we agree to do the following things: allow the provider to display marketing materials in our leasing office and other common areas, include contact information in the move-in packet and on the resident portal and allow providers to hold community events from time to time. In return for assisting with marketing their service, the providers will typically pay some type of compensation to us. Often this compensation is a percentage of the provider's recurring revenue it collects from its subscribers at the building. The percentage of revenue shared increases as the provider's penetration rate increases. The revenue share in the contract can range from zero to 8 or 12%, depending on the provider's penetration in the building. In reality, however, the amount we actually receive typically falls in the range of three to six percent, because the higher penetrations required for the provider to pay the higher percentages are not reached. The amount of compensation providers have been willing to pay has gone down over

time, and although the amount of the revenue share is negotiable, the maximum amount they will pay depends largely on their internal policies, rather than on our negotiation demands.

16. GID/Windsor seeks to enter non-exclusive marketing arrangements with multiple providers at a single property whenever possible. We strive to make a choice of broadband providers available to residents and we want our on-site staff to be able to market each provider's services so that residents can choose a service from the provider of their choice that meets their needs and budgets. Thus, whenever possible we try to enter only non-exclusive marketing arrangements. At properties that are subject to exclusive marketing agreements (often properties we purchased where we assumed a contract from a prior owner), we are looking for opportunities to convert to non-exclusive marketing agreements either when the contract expires or even earlier if there is an opportunity to negotiate a conversion with the provider. Even though the financial offers from service providers are far less rewarding for a non-exclusive marketing agreement than exclusive marketing offers, our higher priority is letting our residents know that there is a choice of broadband providers available. In fact 65% of our communities have **only** non-exclusive marketing contracts in place while only approximately 35% have an exclusive marketing contract.

17. GID/Windsor owns or manages some apartment properties in which one provider has exclusive marketing rights. However, as noted in the tables below, at many of our properties where one provider has exclusive marketing rights other providers are still serving our residents either without a contract or in some cases with a contract that does not include marketing rights (an "access only" contract). Residents are very much aware of which entities are offering services in the community at large because they are exposed to many forms of advertising and marketing in all forms of media, and also know from other resident in the community. While our

exclusive marketing agreements grant certain rights to the respective providers, they do not prohibit on-site staff from answering basic questions from residents about the availability of other services. Consequently, it is not difficult for residents to learn whether there is a competitive alternative in their building.

18. Our on-site staff is aware of the differences between exclusive access agreements and exclusive marketing agreements, and they know which providers are permitted to serve their properties. On-site property managers, however, do not have the authority to grant or deny access to providers or enter into agreements with providers. Nevertheless, it is common for provider representatives to contact property managers and attempt to gain access or make claims of various kinds regarding the rights of the provider. Such communications should be made to the appropriate owner representatives, yet providers continue to rely on untrained personnel who contact the wrong people and are then surprised when they fail to get satisfactory answers.

Agreements for Installing Service in New Buildings.

19. Agreements for installing facilities in new buildings take the same basic forms described above, except that, because there is no existing wiring in the building, part of the negotiation between GID/Windsor and the cable MSO will typically involve which party will bear the cost of providing and installing the home run wiring that will be used by the MSO. If GID/Windsor assumes some or all of the cost, that cost is often offset in part by the compensation the MSO will pay under the service contract. Regardless of which party actually provides and installs the home run wiring, title to that wiring will be held by the property owner. With AT&T and Verizon, this negotiation does not occur as both Verizon and AT&T routinely insist on installing, owning and exercising exclusive control over their own fiber home run lines

that extend to each unit. In addition, whenever possible we install extra conduits in case we have additional providers in the future.

20. In some cases, providers prefer to use their own technicians or contractors for the installation of their facilities, rather than having our contractors do the work. In new construction, we often install microduct provided by the cable MSO, and their contractor will later install the wiring or fiber optic cable within the microduct. On the other hand, Verizon and AT&T typically want to install both the microduct and the fiber that is housed within the microduct. One reason we sometimes prefer the MSO approach is that if we can control the timing of installation of the microduct and if we are under contract with the contractor who will perform such work, we have fewer concerns that construction of the entire building may be delayed while we wait for the provider (like AT&T and Verizon) and its contractors to do the work.

Types of Agreements in Our Portfolio.

21. The following table describes in detail the types of providers and agreements that GID/Windsor currently has in place at all of its communities, excluding properties at which broadband service is available on a bulk basis. Two of our 103 properties are subject to bulk contracts so the table on the following page is based on a total of 101 properties, covering 28,754 residential units in 13 different states.

Table 1: Types of Agreements in All Apartment Properties Owned or Managed by GID/Windsor

	Number of Properties	Percentage of Portfolio	
Properties with one broadband provider	2	2%	**Contracts**
[redacted]	Exclusive marketing rights		2
	Exclusive Wiring contracts		2
	Use of owner wiring		1
	Use of provider wiring		1
Properties with two broadband providers**	84	83.1%	**Contracts**
[redacted]	Exclusive marketing rights		33
	Exclusive Wiring contracts		114
	Use of owner wiring		70
	Use of provider wiring		44
Properties with more than two broadband providers**	15	14.9%	**Contracts**
[redacted]	Exclusive marketing rights		24
	Exclusive Wiring contracts		15
	Use of owner wiring		9
	Use of provider wiring		0
TOTAL number of properties	101	Percentage of Portfolio	
Properties with exclusive marketing contracts	35	34.6%	
Properties with one or more exclusive wiring contracts	101	100%	

****** In these categories, we have included any service provider who serves a property even if the provider is capable of only delivering Digital Subscriber Line (DSL) service. This includes properties where the telephone company has not retired its copper facilities and upgraded to fiber. While DSL is considered a broadband service, GID/Windsor is not sure if the speeds provided at some of our existing "copper" properties truly meet the parameters of a "broadband" service.

GID/Windsor has been actively engaged in efforts to have the applicable telephone companies upgrade our copper properties to fiber so that our residents have a better option for

high-speed broadband service that is an improvement over DSL. However, our efforts have been only partially successful. We just recently reached agreement with Verizon to upgrade an existing 244-unit residential property in Arlington, Virginia to fiber. AT&T also has upgraded 8 of our existing properties with fiber. However, we are largely subject to the whims of the telephone company when it comes to which properties get upgraded and which do not. As recently as October, 2018, we were working with AT&T to upgrade 19 of our other existing properties located in AT&T's footprint. Design plans had been exchanged at a number of these properties and details were being finalized when AT&T abruptly curtailed it fiber overbuild plans for existing properties. Through no fault of GID/Windsor, our residents of these 19 properties will not have access to AT&T's gigabit service that is available only at their fiber properties. AT&T did not refuse to serve these properties because of any other contractual arrangements we had in place with other providers. They simply pulled the plug on their fiber overbuild plans for a reason that has never been adequately explained. Apparently, AT&T just changed its business models. We continue to look for opportunities with both the telephone companies and smaller, independent providers to bring additional choices of broadband services to residents of our existing properties.

22. The following table describes in detail the types of providers and agreements that GID/Windsor has entered into for non-bulk service in properties constructed and opened since January 1, 2016. During this time period, GID/Windsor has opened 26 properties but one of them is subject to a bulk agreement so the table on the following page is based on a total of 25 new construction properties.

Table 2: Types of Agreements in Newly Constructed Properties Completed and Opened from 2016 to Present

	Number of New Builds	Percentage of New Builds	
Properties with one broadband provider	0	0%	
Properties with two broadband providers**	17	68%	**Contracts**
[redacted]	Exclusive marketing rights		5
	Exclusive Wiring contracts		54
	Use of owner wiring		28
	Use of provider wiring		26
Properties with more than two broadband providers**	8	32%	**Contracts**
[redacted]	Exclusive marketing rights		0
	Exclusive Wiring contracts		15
	Use of owner wiring		8
	Use of provider wiring		7
TOTAL number of new build projects since 2016	25	Percentage of New Builds	
New builds with exclusive marketing contracts	5	20%	
New builds with one or more exclusive wiring contracts	25	100%	

GID/Windsor has encountered little reluctance from providers for deploying services to our new build properties despite the fact that there is at least one exclusive wiring contract at all of them and many of the new build properties have two exclusive wiring contracts: one with the MSO who uses Owner-owned fiber or coaxial home run on an exclusive basis, and one with the telephone company (such as Verizon or AT&T) who uses their own fiber home run lines on an exclusive

basis. Similarly, at the fraction of our new build properties (20%) where one provider has exclusive marketing rights, other providers have been willing to deploy services on an "access only" basis. For example, at a recent new build project we are managing in Redwood City, California, the MSO has exclusive marketing rights but AT&T has agreed to install fiber facilities and deploy services on an "access only" basis.

Costs and Revenues

23. The ancillary revenue GID/Windsor receives from providers is important because all revenues attributable to a building affect the profitability of the property. But at the same time, GID/Windsor does not earn ancillary income from service providers at all of our properties and the revenue GID/Windsor earns from communications providers at certain properties is small compared to both our investment in building and the income we receive from residents in rent. GID/Windsor has invested many millions of dollars in acquiring or developing each of our properties and we believe it is not only fair and reasonable for our company to be compensated by broadband providers for their use of our property, but also our fiduciary duty to the owners of the assets to negotiate reasonable compensation for that use. Conversely, that same fiduciary obligation compels us to ensure that our properties remain attractive places for our residents to live. As noted earlier, this means that we must ensure that our residents have access to high quality, reliable broadband service and a choice of providers. There is therefore a balance between maximizing compensation from providers and making sure residents have a choice, and that balance is best achieved through free market negotiations. In addition, the providers have their own policies and incentives and simply will not agree to pay more than amounts that they set. They know that we have to have the service at the property.

Sharing of Wiring Is Not Desirable.

24. We believe the FCC should encourage overbuilding and not promote the sharing of wiring. Our experience when wiring is shared among providers is that it is very difficult to enforce obligations such as repair and maintenance because each provider points to the other as the party that should perform the work. This results in sub-par conditions which reduce the level of telecomm/internet services that our residents demand.

Mandatory Access.

25. GID/Windsor own or manages 21 apartment communities in the following states or cities that have mandatory access statutes: New York, New Jersey, Massachusetts, Illinois, and San Francisco, California. Under these statutes, certain providers have the right to obtain access to our properties, provided that they construct the necessary facilities. I am not aware of any case in which GID/Windsor has refused entry to a provider that properly requested access in accordance with an applicable mandatory access statute. In our experience, many service providers do not actually invoke mandatory access very often. Instead, providers use mandatory access as leverage in negotiations about a service contract. GID/Windsor prefers having a service contract with any provider serving our properties so that clear rights and responsibilities are set forth in an enforceable agreement. These contracts provide a number of direct benefits for residents. For example, we have ensured through a number of service contracts we have entered with Wave G and with AT&T (where AT&T has deployed fiber to the units) that our residents will be able to subscribe to broadband speeds of up to a gigabit. Recently, one of the MSOs in Chicago suggested that it would use the applicable mandatory access laws in Illinois to gain access to a new project we are developing there. However, that provider never actually sent the notices required to invoke mandatory access. Instead, when we approached the MSO

about negotiating a service contract for the project, the MSO promptly provided a proposal. As a result, we are currently negotiating a service contract with that MSO which we anticipate will be finalized within the next several weeks. However, the delays caused by the MSO's threat to invoke mandatory access rather than approaching us to start negotiations earlier may result in the MSO's services not being available to residents at the time the project opens and residents initially move in.

26. On the other hand, GID/Windsor, does not have the right to require these providers to serve our buildings. In the Chicago example above, had we wanted the MSO to serve our new project, the MSO likely could have refused to do so. Thankfully, it looks as though the MSO's services will be available as a choice to our residents thanks to a freely-negotiated service contract. We think this is a prime example of the open free-market working to bring a choice of broadband services to our residents. The MSO's threats to use mandatory access to serve this property quite frankly just caused delays.

Distributed Antenna Systems

27. In-building cellular coverage is a growing problem for the apartment industry as a whole. The newer energy efficient buildings (i.e. buildings with concrete framework and low-e glass) tend to impede the wireless carrier's signals. None of the cellular carriers are willing to pay the cost to install a cellular signal enhancement system, so the capital and operating costs for the cellular signal enhancement system have to be paid by the owner. The capital cost for a cellular signal enhancement system varies widely and we have seen estimates ranging from $0.40/square foot to $2.00/square foot in extreme cases. The primary solution for cellular reception problems is the Distributed Antenna System, but it is very expensive in part because you have to buy a license from the carrier to redistribute their signal and not all carriers will

agree to a license. There are other solutions available, but they are all still very expensive and don't always fully correct the problem.

28. Because the burden of cost is on the owner and because we provide wifi in common areas, the solution we have explored is to extend wifi into the hallways to provide wifi calling for our residents. We have generally seen costs in the $0.40/square foot to $0.50/square foot range. It is especially efficient to put in this option during new construction.

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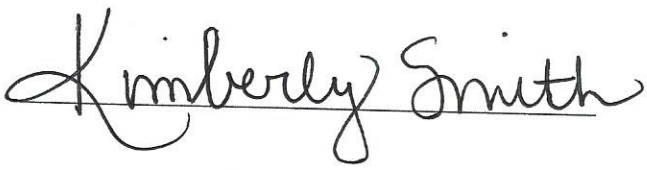
29. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 29th day of August, 2019, in Dallas, Texas.



Kimberly Smith

EXHIBIT I
Declaration of Lisa Yeh

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF LISA YEH IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Lisa Yeh, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Vice President of Asset Management for Essex Property Trust, Inc. ("Essex"), the 10th largest apartment owner in the United States and the 18th largest apartment manager in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/

3. I have served as Vice President of Asset Management since 2018.

4. Essex currently owns a total of 247 apartment communities, comprising 61,895 units, located in 2 states.

The Residential Real Estate Industry Is Highly Competitive.

5. Essex is fully aware that residents in our communities need high quality broadband internet access service and want a competitive choice of broadband providers. They demand high-speed and reliable service and they expect a choice of providers. We are also fully aware that our residents have choices in other areas of their lives, like deciding where to live. If Essex cannot meet the needs of our residents, they can and will move out of our communities which is obviously to our detriment. We have recently undertaken an initiative to increase the number of choices for reliable, high quality, and high speed broadband service across our entire portfolio.

6. That is why a majority of our communities have at least two broadband vendors available to residents. These vendors typically include the local franchised cable operator, the local telephone company's broadband product, and often one or more independent internet service providers ("ISPs"). In fact **61%** of our communities have two broadband vendors available including **7%** that have three or more. These percentages are on the rise and we intend to continue that trend. In all of our new build developments we have completed from 2016 to present, **100%** have two broadband including 17**%** that have three or more. For all of our communities, including those where only one provider is currently available, we are actively seeking to bring additional choices to our residents. Earlier in 2019, I assigned to one of our Managers, Ms. Courtney Jones, the task of trying to identify at least one ISP to serve each of our 247 multi-family communities that was not already adequately served by another ISP. Ms. Jones has been successful in identifying ISPs to build-out and provide service to some of our communities, however she has faced obstacles at some communities for various reasons as described herein. Those reasons mostly have to do with location (the community is not in an ISP

footprint), cost (the ISP balks at the cost of deployment at certain communities), and the ISP's refusal to install fiber or wiring all the way to the unit (in situations where the existing wiring at a community is not sufficient for the ISP to deliver broadband services). To our knowledge, an ISP has never refused to serve one of our communities because of a marketing agreement or an exclusive use of wiring arrangement with another provider.

7. Generally speaking, we will essentially always have service at our properties from the franchised cable multiple system operator ("MSO"). In the areas where Essex owns communities, these MSOs have such a large presence that we expect them to serve all our communities, and our residents expect to have their service as an option.

8. Residents also typically are very much aware of the existence of broadband service from the local exchange carrier. Local exchange carriers serve a large majority of our communities but most of our communities do not have fiber facilities installed all the way to the units. In new build situations where AT&T is the local exchange carrier, AT&T beginning approximately 5 or 6 years ago will now regularly install fiber all the way to the residential units of the community. These fiber-to-the-unit deployments are described in more detail in paragraph 12 below. In those fiber-to-the-unit situations, residents have the option of ordering much faster broadband speeds such as AT&T's ***gigabit*** broadband service. However, for our older properties, AT&T has not upgraded existing copper facilities to fiber which means our residents in those older buildings do not have access to those higher speed services. This was a situation Essex set out to remedy. In 2018 Essex was actively engaged with AT&T in plans to upgrade to fiber-to-the unit at a majority of our older communities. We worked with AT&T to complete site assessments at **seventy-two** different residential complexes and we were on the verge of completing the arrangements and agreements for the fiber upgrades. However around

the end of October, 2018, AT&T, rather abruptly, curtailed its fiber upgrade program. As a result, the residents of these 72 communities remain unable to receive AT&T's gigabit broadband service. Fortunately, Essex has made arrangements with other providers at these properties so that residents are still able to receive high-speed broadband services.

9. The newer competitive ISPs are a good alternative which is why Essex recently launched the initiative discussed earlier to try to bring at least one ISP to each of our communities. However, service from these ISPs is typically only available within their footprints where they have deployed fiber which is a limiting factor. Essex welcomes service from such providers, both fixed wireless and fiber-optic-based, and we have entered into agreements with ISPs such as WAVE G, Bel Air, Consolidated Smart Systems, AerioConnect, and Willoweb to serve some of our communities. There have been instances, however, when we have had discussions with ISPs about potential deployment to a community or a group of communities but they have been unable to help. For example, we reached out to numerous ISPs about potential deployment to a new construction project in Santa Clara, California but we were told that the site of that project was not within any of their network footprints. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their fiber footprints, ISPs often will only serve selected communities that they determine can meet their internal rate-of-return requirements. For example, we have reached out to numerous ISPs about deploying to our ***garden-style*** communities that we know are within these providers' footprints. However, those ISPs have declined such opportunities and have told us that deploying to garden style communities is too costly from their perspective due to the physical layout of such communities. As set forth below in paragraph 13, we have

also run into roadblocks with ISPs who do not want to install fiber all the way to the units in situations where the existing wiring they want to use instead is not sufficient for their needs.

Agreements for Service to Essex Communities.

10. In the case of service to an existing property from the local cable franchisee, Essex typically enters into agreements in which we make available the existing cable home run wiring (this is typically coaxial cable, but sometimes it is fiber optic cable) on an exclusive basis. For historical reasons going back many years, it is very rare for a cable operator to own the wiring inside an existing property. Instead, the MSO will contract with us to use Owner-owned home run wiring on an exclusive basis. In exchange for such exclusivity, the MSO will agree in the contract to be responsible for all maintenance and repair of the home-run wiring. This makes sense because service providers such as MSOs have skilled and trained technicians who are far more qualified and competent to maintain and repair broadband wiring than our own maintenance personnel. This provides a tremendous benefit for our residents who experience fewer service issues related to faulty wiring than situations where no one party has clear repair and maintenance obligations. The terms and conditions of the MSO's use of our home-run wiring factor into the financial consideration paid by the MSO under our service contracts. One component of this compensation typically takes the form of a "door fee," which is a one-time payment equal to a negotiated amount for each apartment unit. Door fees can range from roughly $75 to $125.

11. So-called "sale and leaseback" agreements are very rare. Most of the national cable operators assume that the property owner owns all of the existing wiring inside an apartment building, for legal and practical reasons. Thus, most of our contracts with MSOs

contain no "sale and leaseback" provision at all. The contracts just state with clarity that the Owner owns the inside wiring but there is no language in the contract that "sells" the wiring to us In older buildings, it is often impossible to determine who paid for or holds title to wiring that was installed many years in the past. Consequently, to the best of my knowledge, Essex has not entered into any "sale-and-leaseback" agreements.

12. The largest national telecommunications company that offers fiber-based broadband service in Essex's footprint, AT&T, routinely insists on installing and retaining title to their own fiber home run wiring. This is a relatively recent change in how AT&T deploys its services when properties are initially constructed in California, the state where most of Essex's communities are located. Prior to AT&T's implementation of fiber-to-the unit deployments at new build communities, AT&T would routinely bring fiber only as far at the project's minimum point of entry (MPOE) where AT&T would connect to traditional telephone wiring installed by Essex. But under AT&T's fiber-to-the unit configuration, AT&T wants to install and own fiber home run lines that extend to the units. In our experience, this is not a point AT&T is willing to negotiate although we have had some instances with AT&T where our contractors pulled fiber embedded in microduct in the risers of our new construction projects although AT&T retained ownership of that fiber and microduct. In other words, AT&T still own all the fiber home-run in the these fiber-to the unit communities all the way up to each apartment unit. By owning the internal fiber home-run, AT&T retains control over it and prevent its use by others. Once AT&T has extended its fiber to each of the units, they connect their fiber to a wiring panel that is our responsibility to install, which interconnects with the wiring inside the unit. In these fiber-to-the-unit situations, AT&T does not enter into exclusive wiring agreements, because they are not using any of our wiring to get to the units. As a practical matter in these fiber-to-the-unit

situations, AT&T's policies result in de-facto exclusive wiring arrangements and put them in the same position as the cable MSOs: both companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each unit. The cable MSOs negotiates for the exclusive right to use wiring we own and the MSOs agree to maintain that wiring, while AT&T bears the cost of installing its own fiber home run lines over which they have exclusive control and which they also agree to maintain. From a financial perspective, these two positions are roughly comparable as far as we are concerned.

13. Competitive ISPs also typically will install their own fiber from the minimum point of entry to each unit or to an intermediary utility closet ("IDF"). As part of our mission described above to deploy at least one ISP to each of our communities, we have learned that most ISPs prefer to extend their fiber lines to the IDF locations where they then look to connect to Owner-owned wiring that extends from the IDFs to the individual residential units. The ISPs cannot use the AT&T fiber that extends to the units in buildings where AT&T has deployed in that manner because such fiber is owned by AT&T and we have no rights to let the ISP use that fiber. Often ISPs will use Owner-owned Category 6 or Category 5(e) wiring to carry their signals to the units **if** such wiring exists at the Property. However, when the ISP extends its fiber only to the IDF closet, there must be some Owner-owned wiring available for the ISP to run its signals from the IDF closets to the units. Often ISPs can use Category 6 or Category 5(e) wiring to carry their signals to the units **if** such wiring exists at the Property. Essex has no objection to allowing such providers to use any such wiring that we own and we have entered numerous agreements with ISPs like WAVE G that allow the ISP to use our wiring. However, in practice that wiring just may not exist. If the property is a recent construction then AT&T owns its own fiber all the way to the units and if the incumbent MSO uses coaxial cable to deliver its

services to the units, there simply may not be any wiring Category 6 or Category 5(e) available for the ISP. In older buildings, the wiring that is available may not be suitable for the ISP's use. One ISP we work with surveyed 70 of our communities that are within their footprint and declined to serve 30 of them (43%) because they told us the existing wiring in those communities was too old and the ISP was not willing to upgrade such wiring or replace it with fiber.

14. Essex enters into marketing agreements with all types of providers. We do not require it as a condition of granting access to a property. In a typical marketing agreement, we agree to do the following things: presenting marketing materials to existing and prospective residents during all lease signings and displaying marketing materials in the leasing offices and/or other administrative areas to existing residents or prospective residents who are not current subscribers. In return for assisting with marketing their service, the providers will typically pay some type of compensation to us. Often this compensation is a percentage of the provider's recurring revenue it collects from its subscribers at the building. The percentage of revenue shared increases as the provider's penetration rate increases. The revenue share in the contract can range from 0 to 10%, depending on the provider's penetration in the building; in reality, however, the amount we actually receive typically falls in the range of three to six percent, because the higher penetrations required for the provider to pay the higher percentages are not reached. The amount of compensation providers have been willing to pay has gone down over time, and although the amount of the revenue share is negotiable, the maximum amount they will pay depends largely on their internal policies, rather than on our negotiation demands.

15. Essex seeks to enter non-exclusive marketing arrangements with multiple providers at a single property whenever possible. We strive to make a choice of broadband providers available to residents and we want our on-site staff to be able to market each provider's

services so that residents can choose a service from the provider of their choice that meets their needs and budgets. Thus, whenever possible we try to enter only non-exclusive marketing arrangements. Even though the financial offers from service providers are far less rewarding for non-exclusive marketing agreement than exclusive marketing offers, our higher priority is letting our residents know that there is a choice of broadband providers available. In fact **87%** of our communities have **only** non-exclusive marketing contracts in place while only **13%** have an exclusive marketing contract.

16. Essex owns or manages some apartment properties in which one provider has exclusive marketing rights. However, at many of our properties where one provider has exclusive marketing rights other providers are still serving our residents either without a contract or in some cases with a contract that does not include marketing rights (an "access only" contract). For example, Charter provides service to one of our communities in Burbank, California on an "access only" basis despite an exclusive marketing agreement in place at such property with another service provider. Residents are very much aware of which entities are offering services in the community at large because they are exposed to many forms of advertising and marketing in all forms of media. While our exclusive marketing agreements grant certain rights to the respective providers, they do not prohibit on-site staff from answering basic questions from residents about the availability of other services. Consequently, it is not difficult for residents to learn whether there is a competitive alternative in their building.

17. Our on-site staff is aware of the differences between exclusive access agreements and exclusive marketing agreements, and they know which providers are permitted to serve their properties. On-site property managers, however, do not have the authority to grant or deny access to providers or enter into agreements with providers. .

18. Agreements for installing facilities in new buildings take the same basic forms described above, except that, because there is no existing wiring in the building, part of the negotiation between Essex and the cable MSO will typically involve which party will bear the cost of providing and installing the home run wiring that will be used by the MSO. If Essex assumes some or all of the cost, that cost is often offset in part by the compensation the MSO will pay under the service contract. Regardless of which party actually provides and installs the home run wiring, title to that wiring will be held by the property owner. With AT&T this negotiation does not occur because, as explained in paragraph 12 herein, AT&T now routinely insists on installing, owning and exercising exclusive control over their own fiber home run lines that extend to each unit.

Costs and Revenues

19. The ancillary revenue Essex receives from providers is important because all revenues attributable to a building affect the profitability of the property. But at the same time, the revenue Essex earns from communications providers is small compared to both our investment in building and the income we receive from residents in rent. Essex has invested many millions of dollars in acquiring or developing each of our properties and we believe it is not only fair and reasonable for our company to be compensated by broadband providers for their use of our property, but also our fiduciary duty to the owners of the company to negotiate reasonable compensation for that use. Conversely, that same fiduciary obligation compels us to ensure that our properties remain attractive places for our residents to live. As noted earlier, this means that we must ensure that our residents have access to high quality, reliable broadband service and a choice of providers. There is therefore a balance between maximizing compensation from providers and making sure residents have a choice, and that balance is best achieved through free market negotiations. In addition, the providers have their own policies and

incentives and simply will not agree to pay more than amounts that they set. They know that we have to have the service at the property.

Service Contracts are Important and Sharing of Wiring Is Not Desirable.

24. As a general rule, Essex believes it is critical to have service contracts in place with the providers who serve our communities. In new build contracts, they are critical to set forth the installation obligations of each party. These contracts also serve a number of important functions, many of which have a direct benefit to residents. For example, we have ensured through a number of service contracts we have entered with WAVE G that our residents will be able to subscribe to broadband speeds of up to a gigabit. Those contracts have helped Essex to resolve issues that were causing poor or disrupted services for our residents. Recently, video and Internet service was out entirely for an entire building at one of our communities in San Mateo, California. When we contacted the service provider to try to get service restored for our residents, the provider told us the issue pertained to faulty wiring that was Essex's obligation to repair or replace and that nothing could be done to restore service to our residents until Essex did that work. That was not the case. In fact, Essex had an enforceable contract in place with the provider that clearly made the provider responsible for the repair and replacement of the faulty wiring. The provider had agreed to this maintenance obligation because it had exclusive use of the wiring in question. Ultimately, the provider replaced the wiring and restored services for our residents. Even though we were not pleased with the provider's response time, we at least had a contract that required the provider to take some remedial action. We fear the situation would have gone unresolved for an even longer period of time had we not had an enforceable contract in place that clearly spelled out the provider's maintenance obligations with respect to the wiring. This is why Essex opposes mandatory access laws that allow a service provider to

deploy services without an enforceable contract that spells out with specificity the maintenance and repair obligations of the parties. This is also an example of why Essex is opposed to any sharing of wiring where no single party has wiring maintenance obligations. We fear that any faulty wiring in a shared-wiring situation may not be quickly repaired and Essex will be in a position of trying to navigate multiple providers over how the wiring will be repaired, who will be responsible for the repairs and what happens to residents' services in the meantime. Thankfully, we were able to avoid that situation at our community in San Mateo thanks to the service contract that clearly spelled out wiring maintenance obligations.

Distributed Antenna Systems

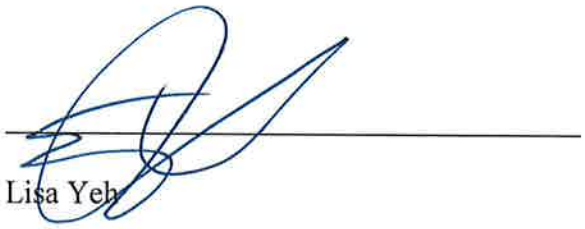
25. In-building cellular coverage is a growing problem for the apartment industry as a whole. The newer energy efficient buildings tend to impede the wireless carrier's signals. None of the cellular carriers are willing to pay the cost to install a cellular signal enhancement system, so the capital and operating costs for the cellular signal enhancement system have to be paid by the owner. The capital cost for a cellular signal can go up to and can exceed $1,000,000 in extreme cases. The primary solution for cellular reception problems is the Distributed Antenna System, but it is very expensive. There are other solutions available, but they are all still very expensive ($200,000+) and don't always fully correct the problem.

26. The average cost to install a Distributed Antenna System at a typical Essex community is approximately $500,000. Essex has paid to have Distributed Antenna Systems at many of its new development projects where cellular reception problems exist. The capital cost to construct the low voltage infrastructure at a Essex community ranges from $500 to $1,000 per unit. The capital costs typically are for structured wiring, conduit systems and infrastructure to support the mobile wireless carrier systems that will be providing service to our residents.

27. All statistics set forth herein regarding the number of service providers at Essex's communities and the nature of Essex's contracts with such service providers are provided to the best of my knowledge. In compiling this data, Essex has relied in part on certain information provided by service providers. We have used our best efforts to confirm all such information is correct. I believe the data and statistics herein provide a valid portrayal of our portfolio, however we are not making a representation that the statistics herein are 100% accurate.

28. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 29TH day of August, 2019, in Woodland Hills, California.



Lisa Yeh

EXHIBIT J

Declaration of Kathleen Austin

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF EQUITY RESIDENTIAL IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Kathleen B Austin, declare as follows:

1. I serve as Assistant Vice President for Equity Residential ("Equity"). According to the most recent survey data from the National Multifamily Housing Council, Equity is the second largest apartment owner in the United States and tenth largest apartment manager in the United States. As of June 30, 2019, Equity owns and/or manages a total of 310 apartment communities, containing 80,061 units, located in seven states and the District of Columbia.

2. I have been employed by Equity since 2000 and I have over 11 years of experience in the procurement of communications services, including broadband services, video services, and telephone services in multitenant environments. My duties include soliciting and evaluating proposals from services providers for the provision of communications services, negotiating the terms of the services agreements with services providers, and monitoring the performance of services providers during the term of services agreements.

The Multifamily Industry Is Highly Competitive.

3. Equity is keenly aware of the importance of ensuring that residents have access to quality broadband services and a competitive choice of broadband services providers. Many residents value the ability to choose their broadband services provider. Younger residents tend to desire high bandwidth broadband packages while older residents tend to prefer a bundle of communications services that include a selection of broadband services, video services, and/or telephone services. Equity also is keenly aware that its residents have options in where they live. In the fiscal year 2018, Equity's resident turnover rate stood at 51.4%, and reducing resident turnover is a major concern for Equity's community managers. If Equity cannot meet resident needs, residents can and will move. Resident turnover reduces occupancy rates, which in turn reduces the income that Equity receives from an apartment community. In short, Equity has a very strong incentive to ensure that each of its apartment communities is served by multiple broadband services providers that provide reliable, high-quality, and high-speed broadband services.

4. Equity almost always engages at least two services providers to deliver broadband services at its apartment communities. These services providers typically include the local franchised cable multiple system operator ("MSO"), the local exchange carrier ("LEC"), and, increasingly, one or more independent internet services providers ("ISPs"). At least 93.5% of Equity's apartment communities are served by at least two broadband services providers, and of those at least 7% have three or more broadband services providers.

5. MSOs provide communications services, including broadband services, at most of Equity's apartment communities. MSOs have a large and heavily advertised presence in the market and have such extensive networks that they are generally prepared to serve all of Equity's apartment communities. MSOs deliver up to 1 Gbps broadband speeds to almost all of Equity's apartment communities. Given the almost ubiquitous availability of MSO services and the ever-increasing broadband speeds available from MSOs, most residents expect MSO communications services as an option.

6. LECs provide communications services, including broadband services, at most of Equity's communities. Residents are very much aware of the existence of broadband services from LECs and where broadband services are available from the LEC, Equity needs to offer that option to meet resident demand as well, particularly if the LEC is able to deliver fiber-based gigabit broadband services. In most cases, LECs install fiber and make available gigabit broadband services to new construction apartment communities. At existing apartment communities, it is not unusual for LECs to refuse to upgrade their existing copper facilities to fiber so that higher speed broadband services are available. For example, while Equity has worked with LECs to extend fiber to a sizable percentage of its existing apartment communities over the past several years, more recently LECs on the west coast have declined to upgrade copper facilities to fiber at a number of Equity's apartment communities. Consequently, in order to allow for resident choice, Equity is in the process of contracting with various ISPs for the delivery high-speed broadband services to add to these apartment communities.

7. ISPs increasingly present a strong alternative for broadband services, but ISP broadband services are only available where the ISP has access to fiber in streets or line of sight for fixed wireless backhaul. For some Equity apartment communities, that means no competitive ISPs are available to provide broadband services. Additionally, ISPs often will only serve apartment communities that meet the ISP's internal rate-of-return requirements. Equity is open to broadband services from ISPs, both fixed wireless and fiber-optic-based, and currently receives broadband services from a number of ISPs, including BelAir Internet, Consolidated Smart Systems, Starry Internet, Wave G, and Webpass by Google Fiber.

8. Equity rarely refuses to allow a services provider to service an Equity apartment community except in extreme circumstances. For example, in one instance Equity refused to allow a private cable operator to continue to serve three apartment communities in California due to a documented history of poor customer service, subpar broadband speeds, and frequent services outages. Another example of a rejected services provider involved an ISP who proposed to serve each and every subscriber by drilling through the exterior of the buildings at an Equity apartment community, which would have created a blight of wiring and marred the aesthetics of the apartment community.

9. Ultimately, Equity is in the business of providing residents with a great place to live. A multitude of competing apartment communities exist in every market in which Equity owns apartment communities. Other apartment owners in those same markets are attempting to attract the same residents to their apartments. High quality, reliable broadband services are an amenity that Equity must offer if it is to succeed in competing with other apartment owners, and if Equity fails to offer apartments and amenities that are superior to its competitors, then it impacts Equity's success.

Agreements for Broadband Services to Existing Apartment Communities.

10. In the case of broadband services to an existing apartment community from the local MSO, Equity typically enters into agreements whereby Equity makes available its existing cable home run wiring (this is typically coaxial cable, but sometimes it is fiber optic cable) on an exclusive basis. For historical reasons going back many years, it is very rare for an MSO to own the wiring inside an existing apartment community. Instead, the MSO will contract with us to use Owner-owned home run wiring on an exclusive basis. In exchange for that exclusivity, the MSO agrees to be responsible for all maintenance and repair of the home run wiring. This arrangement makes sense for Equity because Equity's personnel are neither skilled nor trained to do these tasks, and granting exclusivity is preferable to requiring the MSO to post-wire, which results in the MSO tearing open walls and ceilings to fish new home run wiring for its own use. The MSO's assumption of the maintenance and repair obligations also is a benefit for residents, who avoid wiring connection fees and who experience fewer services issues due to faulty wiring than situations where multiple services providers share wiring and no services provider will accept any repair and maintenance obligations. In many cases, in exchange for exclusive use of the home run wiring, the MSO also will agree to upgrade the home run wiring if necessary to enable the MSO to deliver its latest and greatest communications services. The benefit to Equity's residents from this arrangement is self-evident. The terms and conditions of the MSO's use of Equity's home run wiring also factor into the financial consideration paid by the MSO under services agreements. One component of the compensation payable by the MSO to Equity takes the form of a "door fee," which is a one-time payment equal to a negotiated amount for each apartment unit. Door fees can range from roughly $50 to $225, which, amortized over the term of a 10-year services agreement, pays Equity between $0.42 and $1.88 per unit per month, an amount that is far less than the cost Equity would incur to facilitate the installation of new home run wiring by the MSO and repair the resulting damage caused by the MSO. This sum also is less than the cost incurred by the MSO to install new home run wiring.

11. The NPRM in this Matter references the existence of so-called "sale and leaseback" agreements. To the best of my knowledge, I am unaware of Equity entering into any services agreements with MSOs (or any other services providers) that contain "sale and leaseback" provisions.

12. LECs that offer fiber-to-the-unit broadband services routinely insist on installing and retaining title to their own fiber home run wiring. These LECs own and retain control over all the fiber in an apartment community from the minimum point of entry ("MPOE") at the apartment community up to each apartment unit. Once these LECs install the fiber to the apartment units, the LECs connect their fiber to a wiring panel that Equity installs, which interconnects with the wiring inside the apartment unit. These LECs do not enter into exclusive wiring agreements because they are not using any of Equity's wiring to get to the units. Therefore, these LECs' policies result in de facto exclusive wiring arrangements and put them in the same position as the MSOs: both sets of companies have the exclusive right to use the wiring they need to reach each apartment unit, and the nonexclusive right to use the wiring inside each apartment unit. Generally, MSOs negotiate for the exclusive right to use Equity's home run wiring and MSOs agree to maintain, repair, and upgrade that home run wiring, while the LECs bear the cost of installing their own fiber home run wiring, over which they have exclusive control and which they also agree to maintain, repair, and upgrade.

13. ISPs also typically will install their own fiber from the MPOE to each unit or to an intermediary utility closet ("IDF"). The ISPs cannot use LEC-owned fiber because it is owned by the LEC and Equity has no right to let the ISP use that fiber.

When an ISP installs fiber to each unit, there is no need for the ISP to connect to any Owner-owned wiring except for the wiring inside the apartment unit. However, when the ISP extends its fiber only to the IDF closet, in order for the ISP to send its signals from the IDF closets to the apartment units, the ISP must either use wiring owned by Equity or the ISP must install its own wiring. Often ISPs can use twisted-pair Category 6 or Category 5(e) wiring to carry their signals to the units if such wiring exists at the apartment community. In principle, Equity has no objection to allowing ISPs to use Equity's twisted-pair wiring that runs between the IDFs and apartment units, but in practice that wiring sometimes may not exist. If a LEC owns its own fiber all the way to the apartment unit and if the incumbent MSO uses coaxial cable to deliver its communications services to the apartment units, there simply may not be any twisted-pair wiring available for the ISP. In those instances, Equity is willing to discuss allowing the ISP to install its own twisted-pair wiring from the IDFs to apartment units.

14. Many of the ISPs that contract with Equity prefer to install and own their own home run wiring all the way to the apartment units for the same reasons as the telecommunications carriers: It is very difficult for any provider to deliver reliable communications services over a network if other competing entities have the right to disconnect and use the home run wiring on a unit-by-unit basis.

15. Equity enters into marketing arrangements with all types of providers, but Equity does not require a marketing arrangement as a condition of granting access to an apartment community. However, Equity generally does require some type of access agreement as a condition of access in order to preserve the operations and aesthetics of the apartment community and to ensure a services provider has adequate insurance to protect residents and the apartment community. In a typical marketing agreement, Equity agrees to do the following things: mention to applicants the availability of communications services from the services provider; supply contact information (including phone number and web address for ordering communications services) for the services provider so residents can order communications services; and coordinate with the services provider for marketing events at the apartment community. In return for assisting with marketing services providers' communications services, the communications providers will typically pay some type of marketing compensation to Equity. Often this marketing compensation is a percentage of the services provider's recurring revenue it collects from its subscribers at the apartment community. The percentage of revenue shared increases as the services providers' penetration rate increases. The revenue share in the services agreement can range from zero percent up to 10 percent, depending on the services providers' subscriber penetration in the apartment community; in reality, however, the amount Equity actually receives typically falls in the range of three to six percent, because the higher penetrations required for the services provider to pay the higher percentages are not reached due to the fact that multiple services providers deliver communications services at almost all Equity apartment communities. Additionally, the amount of marketing compensation that services providers have been willing to pay has gone down over time, and although the amount of the revenue share is negotiable, the maximum amount services providers will pay depends almost exclusively on the services providers' internal policies rather than on property owners' negotiation demands.

16. Whenever possible, Equity seeks to enter non-exclusive marketing arrangements with multiple services providers for each apartment community. Equity strives to make a choice of broadband providers available to residents and wants on-site staff to be able to market each provider's services so that residents can choose a services provider that meets their needs and budget. Thus, whenever possible Equity tries to enter only non-exclusive marketing arrangements. Even though the financial

offers from services providers are far less rewarding for non-exclusive marketing arrangements than exclusive marketing offers, Equity's higher priority is letting residents know that there is a choice of broadband services providers available. In fact, 68% of Equity's apartment communities have **only** non-exclusive marketing agreements in place while only 29 % have an exclusive marketing agreement.

17. Even though Equity owns or manages some apartment communities in which one provider has exclusive marketing rights, the majority of the apartment communities with an exclusive marketing agreement in place also have a second services provider who is servicing the apartment community. Residents are very much aware of which services providers offer broadband services in the community because they are exposed to many forms of advertising and marketing in all forms of media. So while exclusive marketing agreements grant certain negotiated rights to a services provider, these agreements do not prohibit on-site staff from answering questions from residents about the availability of other services. Consequently, it is not difficult for residents to determine what services providers are available at a particular apartment community.

Agreements for Installing Broadband Services in New Buildings.

18. Agreements for installing broadband facilities in new construction apartment communities take the same basic forms described above, except that, because there is no existing wiring in the apartment community, part of the negotiation between Equity and MSOs and ISPs typically involves which party incurs the cost of providing and installing the wiring that will be used by the MSOs and ISPs. If Equity assumes some or all of those installation costs, the MSO and ISP often offset a portion of the cost via the compensation the MSO or ISP will pay under the services agreements. The compensation paid by the MSO or ISP is a fraction of the cost incurred by Equity to provide and install wiring for use by the MSO and ISP. Regardless of which party actually provides and installs the wiring, Equity normally owns home run wiring installed for use by the MSO or the ISP.

19. With LECs, Equity rarely negotiates which party provides and installs home run wiring because LECs routinely insist on installing, owning, and exercising exclusive control over their own fiber home run wiring that extends to each unit.

Types of Agreements in Equity's Portfolio.

20. The following describes the types of services providers and services agreements currently in place at Equity's apartment communities, excluding apartment communities at which broadband services are available on a bulk basis:

- Apartment communities with one known services provider: 20 or 6.5% of Equity's portfolio. Of those, all have exclusive marketing and home run wiring usage provisions.
- Apartment communities with two services providers: 265 or 86.5% of Equity's portfolio. Of those, 54 have exclusive marketing rights and 234 have exclusive home run wiring usage provisions.
- Apartment communities with three or more providers: 22 or 7% of Equity's portfolio. None of these have exclusive marketing rights, but a number have exclusive wiring rights.

21. Of the 11 apartment communities developed by Equity, or a partner of Equity, since January 1, 2016, six or 54.5% of those apartment communities have two broadband services providers, each capable of delivering gigabit broadband services to residents, and five or 44.5% have three or more broadband services providers, with at least two capable of delivering

gigabit broadband services to residents. These percentages reflect Equity's dedication to providing its residents a choice in broadband services providers.

Costs and Revenues.

22. The revenue Equity receives from services providers is minute compared to both Equity's investment in its apartment communities and the income Equity receives from residents in rent. Equity has invested many billions of dollars in acquiring or developing apartment communities and it is fair and reasonable for Equity to be compensated by services providers for their use of Equity's property. It is Equity's fiduciary duty to the owners of Equity to negotiate reasonable compensation for that use. That same fiduciary duty compels Equity to ensure that its apartment communities remain attractive places for residents to live. Consequently, as noted previously, this means that Equity must ensure that residents have access to high quality, reliable broadband services and a choice of broadband services providers. There is a balance between seeking compensation from services providers and making sure residents have a choice, and that balance is achieved through free market negotiations.

23. Equity's average rent across its portfolio, as of June 30, 2019 is $2,815 a month and the median cost of broadband services is roughly $50 a month. Let us assume an apartment community with 100 units, whose owner receives a typical door fee of $150 per unit. In such a case, a typical agreement with an MSO would yield a one-time door fee of $15,000 for a 10-year agreement, the equivalent of $1,500 a year. The maximum revenue a single services provider or combination of services providers could earn from delivering broadband services to residents would be $60,000 a year, assuming every resident subscribed to broadband services. A five percent marketing fee would produce additional revenue of $3,000 per year. In other words, the property owner would earn approximately $6,000 a year in fees from the broadband provider or providers.

24. To put this in perspective, consider that the average rent revenue cited above, the property owner would receive at the same property is a gross of $3,378,000 per year. The rent revenue from a single apartment unit would be $33,780, more than five (5) times the total revenue from the broadband services providers for the entire apartment community. Even if the broadband revenue was doubled to account for marketing fees on video services, the total revenue is far less than the rent from a single apartment unit. The fees owners receive from broadband services providers are simply not large enough to create an incentive to deter entry by competitive services providers. Losing a single resident per year due to poor broadband services or a lack of choice is a much greater disincentive to any owner.

Sharing of Wiring Is Not Desirable.

25. In my experience, the sharing of wiring by multiple services providers rarely works out well for Equity, residents, or services providers. Services providers utilize technicians, with varying levels of knowledge and expertise, to install and maintain wiring using various different methods. In scenarios where services providers shared wiring, experience shows a significant increase in damage to the shared wiring, disputes related to usage of the shared wiring, unwanted disconnections of communications services (e.g., as a services provider takes use of a wire being actively used by another services provider), and the implementation of equipment (such as signal splitters) that impede one or more services providers' ability properly deliver communications services to residents.

Mandatory Access.

26. Equity owns or manages 111 apartment communities in the following jurisdictions that have enacted mandatory access laws: District of Columbia, Massachusetts, New Jersey, New York, and San Francisco. Under these mandatory access laws, qualified services providers have the right to obtain access to apartment communities, provided that the qualified services providers meet the requirement of the mandatory access laws, which typically includes an obligation for the qualified services provider to construct the necessary wiring and other facilities to provide its communications services. I am not aware of any case in which Equity has refused entry to a qualified services provider that properly requested access in accordance with an applicable mandatory access law.

Exclusive Use of Rooftops.

27. To the best of my knowledge, Equity has not entered into any agreements granting any entity the exclusive right to use the space on the roof of any of Equity's apartment communities. Equity has granted wireless carriers, satellite providers, solar panel providers, and other entities the exclusive right to use a portion of a rooftop for their equipment, but it is not in Equity's interest to grant a single entity the exclusive right to control an entire rooftop because it forecloses the possibility of bringing in future technologies and interferes with Equity's ability to earn additional revenue from another lessee.

28. At select apartment communities, Equity has entered into an arrangement with SBA Communications Corporation ("SBA") granting SBA the exclusive right to market rooftop occupancy opportunities and to manage rooftop antenna projects. This arrangement does not grant SBA exclusive usage rights to Equity rooftops, nor does it empower SBA to make decisions regarding which services providers are permitted to occupy Equity's rooftops. Again, it is not in Equity's interest to grant a single entity the exclusive right to control an entire rooftop.

29. Approximately 33, or 11%, of Equity's apartment communities support some type of rooftop antenna operator. A number of these apartment communities support multiple rooftop vendors, with several supporting as many as four different operators. Currently, Equity has 48 existing rooftop antenna operator agreements, with approximately 10 additional potential operator antenna projects in the exploratory phase. These operators include cellular, fixed wireless, satellite providers, weather monitoring systems, and utility or governmental antennas.

30. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 29th day of August, 2019, at Chicago, Illinois.

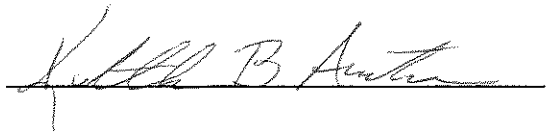


EXHIBIT K

Critique and Analysis of Mandatory Access Laws and Broadband Use in Residential Multi-Tenant Environments (Aug. 2019)

NATIONAL MULTIFAMILY HOUSING COUNCIL

Critique and Analysis of Mandatory Access Laws and Broadband Use in Residential Multi-Tenant Environments, August 2019

Background

Mandatory access laws (MALs)have been enacted in many jurisdictions across the United States. The goal of these laws is to make certain communications services more available to occupants of multi-tenant environments (MTEs) by requiring property owners and managers to allow certain service providers to install the wiring and equipment needed to provide their services. Multifamily units, more specifically apartments, are included in the Federal Communications Commission (FCC)'s definition of MTEs. To date, mandatory access laws have been enacted in 16 states and the District of Columbia.

There is currently limited research regarding the effectiveness of these mandatory access laws in expanding broadband deployment to MTEs, however. The main reason for this is a lack of data. There is very little publicly available data regarding broadband availability and/or usage for commercial properties such as retail and office properties; for apartments, the American Community Survey provides data on whether a household has a broadband internet subscription. A recent study conducted by Steven Kauffman and Octavian Carare of the FCC attempted to examine the impact of these laws on broadband availability and usage in residential MTEs (apartments).

Kauffman and Carare's analysis found that the presence of a state mandatory access law was associated with an increase of approximately 1.8 percentage points in the proportion of households living in MTEs that had a broadband subscription, after running a regression model that took into account other factors such as income, age and race that also tend to be related to subscription rates. The study similarly found that mandatory access laws were associated with an increase of 1.5 percentage points in the fraction of households living in non-MTEs (single-family units) that had a broadband subscription. They argue that this finding indicates mandatory access laws result in higher broadband usage by residents of MTEs.

The main problem with this finding is that mandatory access laws do not apply to non-MTE households, so non-MTE households should not have been included. Once included, no statistically significant relationship should have been detected between mandatory access laws and non-MTE households. Thus, the relationship found between mandatory access laws and non-MTE households must stem from other compositional differences between states with and without mandatory access laws that were not explicitly controlled for in their model. Kauffman and Carare provide no follow-up rationale for why non-MTEs might be affected.

NMHC Analysis

For our analysis, we began with the assumption that mandatory access laws should have no effect on broadband subscription rates among non-MTE units. Any statistical association found between mandatory access laws and subscription rates in non-MTE units could therefore be attributed to other compositional differences between states. The relevant question then became whether any *additional* association could be found between mandatory access laws and broadband subscription rates in MTEs *beyond* that which was observed among non-MTE units. To address this question, we used Kauffman and Carare's first logit model as a starting point (Model 1 in Table 4 of the paper) and added in an interaction term between MAL (the presence of a state mandatory access law) and MTE (a household in a multi-tenant environment). The results from our model are compared to the FCC model in the following table.

Table 1

	FCC Model 1[1]		Revised Model 1	
MAL	0.1661***	0.000	0.1641***	0.000
MAL * MTE			0.0101	0.350
log(Household Income)	0.2575***	0.000	0.2578***	0.000
Number of Household Members	0.0268***	0.000	0.0270***	0.000
Age	-0.0105***	0.000	-0.0104***	0.000
Age*Age	0.0001***	0.000	0.0001***	0.000
No Children Present	-0.0421***	0.000	-0.0423***	0.000
Married	0.1033***	0.000	0.1038***	0.000
Completed High School	0.4253***	0.000	0.4255***	0.000
Completed High School	1.3176***	0.000	1.3171***	0.000
Asian	0.4067***	0.000	0.4063***	0.000
Black	-0.0770***	0.000	-0.0774***	0.000
Hispanic	-0.1610***	0.000	-0.1617***	0.000
White	0.1874***	0.000	0.1878***	0.000
Completed College * Age	-0.0136***	0.000	-0.0136***	0.000
Constant	-1.5349***	0.000	-1.5424***	0.000
Census Division Fixed Effects	Yes		Yes	
Number of Observations	916,374		916,374	
Psudo R2	0.0549		0.0549	

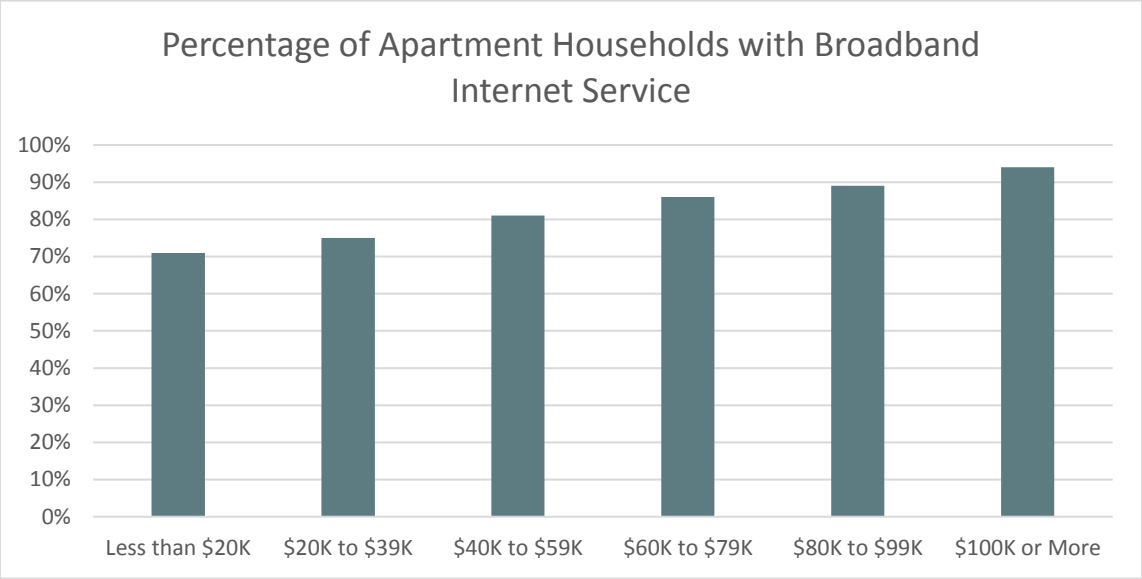
****denotes a significance at the p<0.5 confidence interval.*

[1] Despite our best efforts in replicating their model, our regression generated slightly different estimates. Nevertheless, the direction, magnitude and significance of our coefficients were not meaningfully changed.

NMHC Findings

Our revised model showed no significant additional association between mandatory access laws and broadband subscription rates for MTEs (relative to non-MTEs). Thus, there is no evidence that mandatory access laws have any effect on broadband subscription.

It is important to note that there are many other variables that were found to be significant in both the original model as well as our model, including educational attainment, age, race/ethnicity, household type, and household income. This is unsurprising, given that the survey question is not whether the household has access to broadband, it is whether the household has a broadband subscription. Given the cost associated with internet subscriptions, it is especially unsurprising that household income is also correlated with broadband use. The following table reinforces the results of both FCC Model 1 and our Revised Model 1 that show the higher the household income, the more likely to report having a broadband internet subscription.



Source: NMHC tabulations of 2017 American Community Survey microdata.

Suggestions for Additional Research

The ideal way to determine whether a mandatory access law truly has an effect would be to look at time-series data. Examining broadband access before and after the enactment of such a law would be the ideal way to determine effectiveness. While the same issue regarding usage/subscription vs. access would still exist, any effects from the mandatory access law would likely be observed in that type of dataset.

For more information, please contact Caitlin Walter, Ph.D., Vice President of Research, National Multifamily Housing Council or Chris Bruen, Director of Research, National Multifamily Housing Council.